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Study to examine challenges in the African region to protecting traditional knowledge, genetic resources and folklore

Note by the secretariat

Pursuant to the decision of the Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 48), Paul Kanyinke Sena, a member of the Forum, undertook a study to examine challenges in the African region to protecting traditional knowledge, genetic resources and folklore. The outcome of the study is hereby submitted to the Permanent Forum at its thirteenth session.

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Study to examine challenges in the African region to protecting traditional knowledge, genetic resources and folklore[1]

I. Introduction

1. Following the introduction, the present study proceeds in four sections. Section II provides a brief overview of the concepts of traditional knowledge, genetic resources and folklore (referred to as indigenous knowledge) and provides a snapshot of some of the main challenges that face indigenous communities with regard to preserving, protecting and promoting their indigenous knowledge. Section III offers an overview of the relevant normative frameworks for protecting indigenous knowledge, and highlights some of the ongoing international, African regional and national processes for securing and strengthening indigenous peoples' rights to indigenous knowledge, as well as the utilization of indigenous knowledge and the flow of benefit to the knowledge holders. Section IV outlines some of the major challenges in the African region for protecting indigenous knowledge, contextualizes the challenges to existing legal frameworks and highlights examples of good practices. Section V offers recommendations to entities of the United Nations system, regional bodies, Member States and indigenous peoples on the basis of the gaps identified.

II. Overview of concepts

2. The present study does not attempt to define traditional knowledge and the interrelated notions of genetic resources and folklore, but offers general comments on the concepts guided by the understanding of indigenous peoples in the African region,[2] who have stressed that indigenous knowledge, genetic resources and traditional cultural expressions all form part of a single integrated heritage and should not be divided into different compartments. The World Intellectual Property Organization (WIPO) has acknowledged that, from indigenous peoples' standpoint, traditional knowledge, genetic resources and traditional cultural expressions raise different issues and may therefore require different sets of solutions.[3] With this in mind, the study applies the term "indigenous knowledge" to describe the entire field of traditional knowledge, traditional knowledge associated with genetic resources, and traditional cultural expressions of indigenous peoples and their communities.

3. Indigenous knowledge is embedded in the cultural traditions and long-standing practices of indigenous communities. It is a living, cumulative body of knowledge, practices, traditions and cultural expressions that have been developed and maintained by indigenous peoples in their interactions with their environments.

[1] The author would like to acknowledge the contribution of Toe Holmström, the team in Africa and the Traditional Knowledge Division of the World Intellectual Property Organization (WIPO) for the support extended to this study. The views expressed in this study are those of the author.

[2] Possible criteria for identifying indigenous peoples in the African region are contained in chapter IV of the report of the Working Group on Indigenous Populations/Communities in Africa, adopted by the African Commission on Human and Peoples' Rights in its resolution ACHPR/Res.65 (XXXIV).

[3] WIPO, Background Brief No. 1, Traditional knowledge and intellectual property.

Holistic in nature, indigenous knowledge is closely linked with the communities' relationship to their lands, their territories and the natural resources. Indigenous knowledge forms a sophisticated set of understandings, interpretations and meanings. It comprises language, naming, classification systems, resource-use practices, customs and belief systems.[4] The concept of indigenous knowledge embraces different meanings for the diversity of indigenous peoples who depend on it for their livelihoods and well-being. Indigenous knowledge involves a living body of knowledge that is sustained, developed, and passed on from generation to generation. The living nature of the components of indigenous knowledge, as employed in this study, therefore makes it difficult to define.[3]

4. A fundamental aspect of indigenous knowledge is that it embodies an indigenous community's collective identity and ways of surviving in and relating to the environment. It is dynamic and evolves to adapt to the changing circumstances and needs of indigenous communities. In short, it represents strategies for indigenous communities to deal with their environments in a wide range of fields, including food and agricultural production, education, trade and economic development. In the field of health, traditional medicinal knowledge is of great social, cultural and scientific importance to indigenous peoples. Indigenous knowledge has a considerable gender dimension that is alive but not often discussed. Indigenous women play a crucial role in the generation, conservation and sustainable use of biological diversity and associated indigenous knowledge, culture and technologies. Providing indigenous women with support to be able to fully participate in and influence all levels of decision-making on the well-being of the community is therefore of crucial importance.

5. The links between indigenous knowledge and customary law are central. Customary laws serve to regulate and control the manner in which the knowledge is communicated, shared, used and applied. In light of the important role of customary law and customary knowledge protection systems, indigenous peoples express concern about the survival of their social institutions and practices in which their knowledge is based, maintained and transmitted. Indigenous peoples have stressed that indigenous knowledge can only survive and thrive when they and their customary laws and practices are fully respected and supported. Indigenous knowledge has accumulated over centuries through empirical observations and interactions with the environment. Indigenous knowledge has been passed on from generation to generation through shared practices and oral storytelling. The fact that there is a lack of written records may have the effect of putting indigenous knowledge at serious risk of extinction.

6. Contrary to intellectual property rights, as recognized by the current intellectual property rights system, indigenous knowledge is largely perceived as belonging to the community rather than to individual members of the community. Being collectively owned, it is not easily protected by the current intellectual property system, which grants protection for a limited period to inventions and original works by named individuals or companies.[3] The lack of legal protection for indigenous knowledge is a significant underlying reason for the current destruction and rapid loss of this knowledge. To effectively protect indigenous knowledge,

[4] J. M. Wekundah, *Why Protect Traditional Knowledge?*, African Technology Policy Studies Network, Special Paper Series No. 44 (Nairobi, African Technology Policy Studies Network, 2012).

effective policy and legal measures should be adopted at the international, regional and national levels, with the full and equal participation of indigenous peoples in drafting and approving those measures.

7. Africa is a continent rich in biodiversity and is home to roughly 50 million persons who identify themselves as indigenous peoples. Their livelihoods and well-being are dependent on their knowledge about the environment and ecosystems in which they find themselves and the genetic resources therein. As in other parts of the world, indigenous knowledge has been developed and maintained as a matter of survival for communities and reflects the particular relationship of indigenous peoples with their environments. However, Africa, especially sub-Saharan Africa, remains the region where more than 218 million people live in extreme poverty. The capacity of rural people to make a livelihood has been dramatically curtailed by warfare, and per capita food production has plummeted. Land degradation, a consequence of extensive agriculture, deforestation and overgrazing, has reached alarming levels and further threatens livelihoods. The poorest people live in isolated zones, deprived of the social safety nets and poverty reduction programmes available in semi-urban and urban areas.[5] This is ironic given the richness of indigenous knowledge and the abundance of natural resources within Africa that could be used to lift the continent out of poverty. Indigenous knowledge, technologies, know-how and practices can help to alleviate poverty. Some of the best practices include the cultivation of drought-resistant and early-maturing crop varieties and traditional techniques of food preservation and storage.[6] Indigenous knowledge systems can play a pivotal role in economic sustainability, self-reliance and cost-effectiveness. Further, indigenous knowledge in sub-Saharan Africa holds particular viability and strength,[7] especially in terms of food security and health care.

8. Indigenous knowledge should therefore be protected, preserved and promoted. Any development policies or programmes that target or that may affect indigenous communities need to fully recognize the important role that indigenous knowledge plays for the survival of the communities and its potential role in the economy as a whole. It is important to underline that the concerns about indigenous knowledge in Africa, as much as elsewhere, are framed and informed by the bigger issues at stake, such as the position of indigenous communities within the wider economy and society of the country in which they reside and their access to or ownership of land that they have traditionally inhabited, used or otherwise occupied. Concerns about the preservation of indigenous knowledge, and the continued way of life of the communities that hold such knowledge, are often symptomatic of the underlying problems that these communities face due to external pressures.[8] In this regard, multiple measures will be required to effectively protect, preserve and promote indigenous knowledge.

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[5] International Fund for Agricultural Development, Rural Poverty Portal.

[6] United Nations Environment Programme, Indigenous Knowledge in Disaster Management in Africa (Nairobi, 2008).

[7] Emmanuel K. A. Sackey and Ossy M. J. Kasilo, "Intellectual property approaches to the protection of traditional knowledge in Africa", *African Health Monitor*, No. 13 (August 2010).

[8] Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy (London, 2002).

III. Relevant normative frameworks and current international initiatives to protect indigenous knowledge

9. For indigenous peoples, the rationale for protecting indigenous knowledge revolves around several intertwined issues, including the question of their fundamental rights; their ability to protect and control access; the use of their own knowledge and cultural heritage[4] while ensuring the flow of any benefits for the utilization of indigenous knowledge; and whether indigenous peoples are able to use indigenous knowledge as a basis for their own forms of development (see E/C.19/2010/14, para. 28). All this requires proactive, enforceable legal instruments and policies at the international, regional and national levels. Some international processes and initiatives have started to respond to the disputes associated with the misappropriation and unauthorized use of indigenous knowledge. The relevant normative frameworks, as well as ongoing international processes for the various aspects of indigenous knowledge are briefly outlined below.

A. Relevant normative frameworks

10. The present study has proceeded with the understanding that indigenous knowledge embraces all the related concepts of genetic resources, traditional knowledge and traditional cultural expressions. At the same time, however, identifying a normative framework for the umbrella term "indigenous knowledge" requires reference to the specific international instruments that deal with all the component parts of indigenous knowledge.

11. The Convention on Biological Diversity has been the pioneer for addressing the issue of recognition, preservation and commercial exploitation of indigenous knowledge. Article 8 (j) of the Convention, the most authoritative provision dealing with traditional knowledge, provides that each Contracting Party shall, as far as possible and as appropriate:

> Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

It should be noted, however, that article 8 (j) has limitations in that it does not discuss the protection of knowledge but calls upon Contracting Parties to respect, preserve and maintain traditional knowledge "subject to national legislation". As such, the article does not guarantee indigenous peoples any rights over their traditional knowledge.[9]

[9] See J. Mugabe, P. Kameri-Mbote and D. Mutta, Traditional Knowledge, Genetic Resources and Intellectual Property Protection: Towards a New International Regime, International Environmental Law Research Centre Working Paper 2001 — 5 (Geneva, 2001).

12. Article 7 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (Nagoya Protocol), is also central to indigenous peoples' traditional knowledge. More importantly, it underlines the need for prior informed consent of indigenous and local communities, thereby using language that is consistent with the language of the United Nations Declaration on the Rights of Indigenous Peoples. Article 7 of the Nagoya Protocol states:

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

13. Building on the framework of article 15 of the Convention on Biological Diversity, especially with respect to access to genetic resources, article 6 of the Nagoya Protocol requires each party, in accordance with domestic laws, to take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities are obtained for access to genetic resources where they (indigenous and local communities) have the established right to grant access to such resources.

14. In relation to the Convention on Biological Diversity, the Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding development proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities also provide direction. The guidelines recognize the long-term negative impacts of many developments proposed to take place on, or impact, sacred sites or lands and waterways of indigenous peoples and the consequent loss of the traditional knowledge, innovations and practices of the affected indigenous communities. They set an important framework within which Governments, indigenous peoples and local communities, as well as others involved in proposed developments should take into account the traditional knowledge, innovations and practices of indigenous communities as part of the impact-assessment processes, and be mindful of the ownership of and the need for safeguarding traditional knowledge, innovations and practices.

15. Further guidance is provided in article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, the most comprehensive recognition of indigenous peoples' collective rights and a reflection of the minimum human rights standards necessary for the promotion and protection of indigenous peoples. Article 31 establishes that:

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

> 2. In conjunction with Indigenous Peoples, States shall take effective measures to recognize and protect the exercise of these rights.

16. Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples is also relevant:

> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
>
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

17. Further to the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on Biological Diversity, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) of the United Nations Educational, Scientific and Cultural Organization also provides for measures to protect and promote the diversity of cultural expressions, particularly in articles 7 and 8.

B. Ongoing international processes

18. In response to concerns over the large-scale unauthorized use and misappropriation of indigenous knowledge, including demands for equivalent protection of traditional knowledge systems, among others, States members of WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereafter "Intergovernmental Committee") in October 2000.[10] In 2009, the WIPO General Assembly mandated the Intergovernmental Committee to undertake text-based negotiations with the objective of reaching agreement on a text (or texts) of an international legal instrument (or instruments) that would ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions. This instrument is expected to give indigenous peoples effective protection over their knowledge. Recognizing indigenous knowledge as intellectual property would be a historic shift in international law and would enable indigenous and local communities, as well as Governments, to protect traditional remedies and cultural expressions against misappropriation and enable communities to control and collectively benefit from any commercial exploitation of their indigenous knowledge.[3] African indigenous communities have a wealth of knowledge and should participate fully in this process, as well as in other related WIPO processes.[11]

[10] See WIPO document WO/GA/26/6, 25 August 2000.

[11] WIPO has continued to progress in its normative and policy work through its standing committees, for example, the Standing Committee on Copyright and Related Rights, the Standing Committee on the Law of Patents and the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications.

19. The need for the full and equal participation of indigenous peoples in the Intergovernmental Committee process has been stressed by the Permanent Forum on Indigenous Issues, most recently during its half-day dialogue with WIPO at the eleventh session of the Permanent Forum in 2012. WIPO should increase its efforts to bring African indigenous representatives into the WIPO meetings, as an affirmative action towards the continent. In this regard, the WIPO Voluntary Fund for Accredited Indigenous and Local Communities, which supports the participation of indigenous peoples' representatives in the meetings of the Intergovernmental Committee, has been crucial and should continue to be supported by WIPO member States.

20. WIPO should adopt modalities that strengthen the full and effective participation of indigenous peoples in the Intergovernmental Committee process, as well as in all other processes regarding legally binding instruments that may affect indigenous peoples' knowledge and intellectual property rights.[9] In relation to the WIPO Intergovernmental Committee process, ensuring the effective participation of indigenous peoples, including indigenous peoples from the African region, in informal consultation and expert working groups, as well as facilitators selected for sessions of the Intergovernmental Committee, is crucial.

21. The Intergovernmental Committee carries out important work, yet the apparent unwillingness of some countries to work towards the adoption of the final outcome document (or documents) hampers real progress. The Intergovernmental Committee, with the full and effective participation of indigenous peoples, should work towards the adoption of an outcome document (or documents) that reflects the core demands of indigenous peoples and that is consistent with the United Nations Declaration on the Rights of Indigenous Peoples. While some progress has been made in the process of drafting new instruments to protect indigenous peoples' knowledge, further progress is a matter of securing indigenous peoples' basic human rights.

IV. Protecting indigenous knowledge in Africa: considering challenges and approaches in the African region

A. Challenges for protecting indigenous knowledge

22. There is a serious lack of awareness of the economic value of indigenous knowledge across Africa, despite various laws and policies and the active use of traditional knowledge in rural areas. There has been very little discussion on the interlinkages between indigenous knowledge and economic development; therefore, very little effort is made by States towards protecting or investing in its development. In many instances, this is actively discouraged and the knowledge is branded "primitive", because it has not been scientifically tested or peer reviewed. Consequently, it is not featured in the education system of most countries. Until recently, the use of traditional medicine was actively discouraged in many African countries as it was deemed to be "unsafe and primitive". Yet for lack of modern medicine, traditional medicine has been relied upon for the primary health-care

needs of over 60 per cent of the population of rural Africa.[12] It is only in the tourism and, now, fashion sectors that culture is recognized and actively encouraged.

23. The impetus towards change is a major challenge in the protection and use of indigenous knowledge in Africa. The education system, organized religion and the media are extremely strong forces in the push for societal change. Indigenous peoples are constantly being reminded that if they don't discard their traditional ways, they will continue to lag behind in the area of development. Strong connections to indigenous knowledge are therefore diminishing and disintegrating as the population ages. It is noteworthy that educated indigenous peoples are at the forefront in driving the message of a need for change.

24. Weak laws and policies and, in some cases, their absence make it difficult to protect indigenous knowledge in Africa. Eighteen countries are members of the Africa Regional Intellectual Property Organization.[13] Most of these countries have some form of law for the protection of indigenous knowledge or are at various stages of developing one. However, because this matter is not a priority, government departments dealing with indigenous knowledge receive the least financing and staff. Enforcement agencies, where established, lack any form of effective enforcement capability. There is also a serious lack of awareness of opportunities for protection even within existing intellectual property laws.

25. The shared and wide use of indigenous knowledge among numerous communities presents the hardest challenge in terms of ownership, protection and utilization. Indigenous knowledge is most often shared among and between communities and their neighbours, distributed across jurisdictions, and is transboundary in nature. Traditional knowledge also develops and evolves simultaneously and in parallel in various indigenous contexts as a result of shared biodiversity and ecosystems that imply similar responses and adaptation methods.[14]

B. Misappropriation of indigenous knowledge in Africa

26. Misappropriation of indigenous knowledge in Africa is a direct consequence of the challenges described above. For the purposes of this study, misappropriation entails the wrongful or dishonest use of indigenous peoples' knowledge without their free and prior informed consent. While indigenous knowledge holders are not aware of the full value of their knowledge within the economy, the pharmaceutical and health industries, among others, are increasingly taking a greater interest in natural products for the development of new drugs and medicines. This has fuelled a growing interest in accessing indigenous peoples' knowledge about the benefits of the natural products they traditionally use. Inventions based on genetic resources found on indigenous peoples' lands are patented and developed by researchers and companies that make significant amounts of money out of these resources, often

[12] WHO, "Promoting the role of traditional medicine in health systems: a strategy for the African region", document AFR/RC50/9, para. 9.

[13] Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, Somalia, the Sudan, Swaziland, Uganda, the Tanzania, Zambia and Zimbabwe. See www.aripo.org.

[14] Manuel Ruiz Muller discussed this issue at an event entitled "Shared traditional knowledge: issues and options", presented at the International Centre for Trade and Sustainable Development in Geneva, 16 July 2013.

without any acknowledgment, recognition or compensation flowing back to indigenous communities. Likewise, indigenous peoples' images and traditional cultural expressions are appropriated and used as brands for product lines in a wide range of industries, including the fashion, tourism and automotive industries.

27. An illustrative example is the market for herbal products. Many of the available products are based on indigenous knowledge. The market for herbal medicine is growing rapidly, with a value currently estimated at $60 billion and expected to reach $5 trillion by the year 2050.[15] Third-party entities continue to patent mixtures that build on indigenous peoples' traditional medicines, without the free, prior and informed consent of, or fair compensation to, the indigenous communities that have improved the value of these plants and genetic resources through careful and continuous accumulation, selection, multiplication and trading of the best-adapted varieties.

28. Large-scale appropriation of indigenous peoples' traditional crafts and cultural productions is also of concern. When indigenous peoples' traditional cultural productions enter the national or international markets, little or no credit is given to the indigenous communities that have maintained these traditions. This lack of acknowledgement means that there is little reverse flow in terms of recognition, attribution or economic reward. Local artists become featureless, and indistinguishable, even sometimes within their own or neighbouring communities. This disrupts hierarchies of authority and the sense of pride that communities have because of their distinctiveness from others.[16]

29. Significant concerns have also been raised over counterfeiting, occurring when indigenous peoples' handicrafts, based upon indigenous knowledge and associated practices, are reproduced by third parties in factories and sold at reduced prices. Indigenous peoples regard this as unfair competition and as discriminatory against traditional methods, materials and techniques. Counterfeiting indigenous crafts and selling them at reduced prices can devastate the economies of indigenous communities, thereby further marginalizing them.

30. Biopiracy of indigenous knowledge, which includes the appropriation of the knowledge, genetic resources and farming practices used by indigenous communities, is also taking place. With ever-increasing frequency, individuals or institutions are seeking monopoly control over resources and knowledge in the African continent.

31. In 2010, the Endorois people in Kenya won a legal claim at the African Commission on Human and Peoples' Rights against the Government of Kenya[17] and are now waiting for the implementation of the Commission's decision. The Endorois people is one of the many indigenous groups that have experienced biopiracy.

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[15] See S. Alikhan, Socio-economic Benefits of Intellectual Property Protection in Developing Countries (Geneva, WIPO, 2000) and Zulfeequar Alam, *Herbal Medicines* (New Delhi, APH Publishing, 2008).

[16] Mar ; Anderson, "Developments in intellectual property and traditional knowledge protection", in Ulia Popova-Gosart, ed., *Traditional Knowledge and Indigenous Peoples* (Geneva, L'auravetl'an Information and Education Network of Indigenous Peoples and WIPO, 2009).

[17] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, communication No. 276/2003, ruling published 4 February 2010.

Genetic resources in the form of microbes were taken from Lake Bogoria by researchers from the University of Leicester, in the United Kingdom of Great Britain and Northern Ireland. The genetic resources were later patented by a company, which cloned the microbes developed from the enzymes on an industrial scale for textile companies and detergent manufacturers. No information or economic revenue was given to the Endorois people at any stage of the process. Estimates put the total value of the resource (now popularly used to bleach jeans) at $600 million per year,[4] money that has not benefited the Endorois, who continue to rank as one of the poorest communities in the country. The African indigenous peoples, such as the Endorois, have had very little control over how their knowledge has been documented, stored or accessed by those who have collected it, and are generally not informed about the findings of the research.[18] It is imperative that States inform indigenous communities of any current and proposed research or bioprospecting activities on their lands, and ensure that these activities are carried out in accordance with international standards on the rights of indigenous peoples.

32. The image of a Masai warrior or a Masai woman adorned with beads remains a powerful image of Africa. Dozens of companies have used and continue to use the Masai image or name to sell products. Roughly 80 companies around the world are currently using either the Masai image or name, including a fashion house that stocks Masai beach towels, hats, scarves and duffle bags.[19] A number of companies have been granted trademarks for the use of the Masai name or images, yet the Masai have not been consulted, nor have they received any compensation for the unauthorized use of their name, images and cultural expressions. The Masai have expressed concern; of particular concern is portrayal of their bodies and images where their jewellery has been used inappropriately. The unauthorized use of indigenous traditional cultural expressions, such as jewellery and chequered fabrics in the case of the Masai, is a commodification of their cultures and of objects that are regarded as sacred or infused with a special meaning by the indigenous community.

33. African indigenous communities' loss of land, as well as restrictions on access to their lands and resources has made it increasingly difficult for them to practise and maintain their indigenous knowledge systems. Though this does not represent an intellectual property issue, it has had far-reaching implications for passing on indigenous knowledge to future generations. In Cameroon, the Baka youth are losing the ability to recognize forest animals or the plants they need for an independent life in the forest. They have significantly reduced geographic knowledge of traditional Baka territories. The Bagyeli youth no longer know how to make snares from vines, nor are they able to recognize the community's traditional hunting territories. The Batwa people in Rwanda and Burundi have been denied access to their forests and have had to develop alternative livelihoods around wage labour, pottery and begging. Consequently, the Batwa people are losing the knowledge of their communities.[18] Living a subsistence life, as well as the ability to transmit knowledge to future generations, is threatened as African indigenous

[18] D. Jackson, Implementation of International Commitments on Traditional Forest-related Knowledge: Indigenous Peoples' Experiences in Central Africa (Forest Peoples Programme, October 2004).

[19] C. Hebblethwaite, "Brand Maasai: why nomads might trademark their name", BBC News Magazine, 27 May 2013.

peoples such as the Baka, the Bagyeli and the Batwa lose access to their traditional lands, thereby implicating their rights to life, health and culture.

34. It has been noted that indigenous peoples across the continent are recognized merely as suppliers of information and at times for initiatives that ultimately dispossess them of their resources and rights. Protected area planners, for instance, rely on indigenous interlocutors when they are assessing potential areas for biodiversity conservation. In the Central African region, a survey of 200 African ethnobotanists indicated that almost half of the ongoing ethnobotanical research was being conducted in areas that were likely to be occupied by indigenous peoples. In many cases, the biodiversity revealed by indigenous peoples became the reason for excluding them from their resources.[18] When evicted or forcibly relocated from their lands and resources, indigenous peoples' very existence as peoples is seriously threatened.

35. Part of the problem that indigenous peoples face in protecting their knowledge is the lack of capacity within their communities, often because of a limited understanding of what might be gained from the use of their knowledge or the consequences if their knowledge were misused and misappropriated. Any legal and/or policy initiatives to protect or benefit the holders of indigenous knowledge need to be tailored to the specific needs and resource constraints of the communities, and include capacity-building programmes, documentation initiatives and broader infrastructural developments, with the full and effective participation of the indigenous peoples. There is also a great need for measures to raise awareness among indigenous communities regarding the potential value of their knowledge, and to develop strategies for indigenous knowledge-based entrepreneurship within indigenous communities. Such entrepreneurship could serve as an important means to fight the disproportionately high rates of poverty that indigenous peoples in Africa suffer, and to protect, preserve and promote cultural practices of indigenous communities.

36. WIPO is encouraged to develop model courses for such capacity-building, including training communities in negotiation processes, elements of free, prior and informed consent processes, benefit-sharing models and dispute resolution. An online course on traditional knowledge as part of the WIPO Academy programme could be developed. Strategies for information dissemination will be critical in this regard.

C. Progressive legal recognition and protection of indigenous knowledge in Africa

37. Owing to the increased awareness by many African States of the commercial value of indigenous knowledge and its potential to create economic growth opportunities, many countries are playing an active role in the discussions on indigenous knowledge, as evident in the work of the Intergovernmental Committee at WIPO. The inclusion of the perspectives and voices of African indigenous peoples in the Governments' inputs to the WIPO process is of utmost importance. Effective partnerships are essential to finding solutions.

38. African regional governmental bodies, such as the African Union, have also addressed the need to protect indigenous knowledge and prevent its misuse by introducing regional legal frameworks and policies to protect traditional knowledge

and genetic resources. The Organization of African Unity, the predecessor of the African Union, adopted the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources in 2000 to serve as a guide for African countries developing national laws on the rights of local communities to their traditional knowledge and genetic resources. Importantly, the African Model Legislation has never been used. It does, however, contain progressive provisions on the rights of indigenous and local communities. For example, it requires States members of the African Union to recognize the rights of indigenous and local communities over their biological resources, as well as traditional knowledge, innovations and practices. Access to traditional knowledge must be subject to prior informed consent from communities. The African Model Legislation also recognizes the collective rights of communities and their customary laws.

39. Within the framework of the African Regional Intellectual Property Organization, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (hereafter "Swakopmund Protocol") was adopted in 2010.[20] The Swakopmund Protocol is open for signature to member countries of the African Regional Intellectual Property Organization, which can use the Protocol to develop laws at the national level. The Protocol has been used as a model for national policy and legislative initiatives in Botswana, Ghana, Kenya, Malawi, Mozambique, Namibia, Uganda and Zambia.[21] The Protocol grants exclusive rights to communities to authorize the exploitation of their traditional knowledge and to prevent exploitation without their prior informed consent. It emphasizes that protection must be tailored to the specific characteristics of traditional knowledge, including its collective and community context. While the Protocol is progressive in its recognition of the collective context of indigenous knowledge, it lags behind in terms of not recognizing the rights of indigenous peoples to their biological resources which, from the viewpoint of African indigenous communities, are closely linked to their indigenous knowledge.

40. Through the New Partnership for Africa's Development (NEPAD), African leaders have also recognized the importance of protecting and promoting indigenous knowledge systems and technologies. Paragraphs 140 and 141 of the NEPAD framework document are devoted to the protection and promotion of indigenous knowledge and related technological innovations. Paragraph 140 states:

> Culture is an integral part of development efforts of the continent. Consequently, it is essential to protect and effectively utilize indigenous knowledge ... and to share this knowledge for the benefit of humankind. [NEPAD] will give special attention to the protection and nurturing of indigenous knowledge ... inventions ... and all other tradition-based innovations and creations....

In order to operationalize paragraph 140, a programme on securing and using Africa's indigenous knowledge base has been established under the African Ministerial Council on Science and Technology, a high-level policy and political

[20] A similar initiative, developed by the Organisation africaine de la propriété intellectuelle, was adopted in 2007.

[21] WHO, African Health Observatory, "Intellectual property approaches to the protection of traditional knowledge in the African region", *African Health Monitor*, No. 13 (August 2010).

forum for ministers of science and technology from all States members of the African Union. The Council's remit is to enable African countries to collectively harness and apply science and technology to transform their economies and attain the Millennium Development Goals.

41. While progress has been made in advancing the legal protection of indigenous knowledge at the African regional level, widespread negative attitudes towards indigenous peoples more generally, and towards their knowledge systems more specifically, pervade and hamper the effective realization of these initiatives. Such negative attitudes relate to all things indigenous, such as traditional practices relating to health, education and agriculture. Such practices and knowledge systems tend to be regarded as unscientific and retrograde. In this regard, training for government representatives and ministerial staff on indigenous peoples and the value of their knowledge for sustainable development would be crucial.

42. The international and African regional legal instruments are not likely to sufficiently address the needs and aspirations of individual States. Well-coordinated national legal and policy initiatives have the potential to effectively address and secure indigenous peoples' right to maintain, control, protect and develop their knowledge and exercise their right to maintain intellectual property rights over their knowledge systems, as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

43. To date, a limited number of policy and legal frameworks for indigenous knowledge have been adopted by African States. The legal vacuum created by the lack of national policy and legal frameworks for indigenous knowledge, and consequent disputes over the ownership, is filled by organizations and researchers who enter the countries in order to collect indigenous knowledge freely. Where international organizations provide support to African Governments' efforts to document indigenous knowledge, some agreements that provide access to document indigenous knowledge have been made without the free, prior and informed consent of indigenous communities. The full and effective participation of indigenous peoples should be ensured in any development of policies and laws on access to genetic material and protection of knowledge and intellectual property rights. Such policies and laws should apply a rights-based framework and be based on the United Nations Declaration on the Rights of Indigenous Peoples, in particular the principle of free, prior and informed consent.

44. Countries in Africa that offer some form of legal protection of indigenous knowledge include Cameroon, Ghana, Kenya, Malawi, Nigeria, South Africa, Uganda and the United Republic of Tanzania. To date, Kenya remains one of the few countries in Africa with a specific policy on traditional knowledge, genetic resources and traditional cultural expressions, even though the policy has yet to be formalized. Kenya also has a draft policy on traditional medicine and medicinal plants. The United Republic of Tanzania has a policy on traditional alternative medicine under its Ministry of Health. Malawi and Uganda have developed bills on traditional medicine, but they are yet to be enacted. South Africa adopted an indigenous knowledge systems policy and a Biodiversity Act in 2004, and also established a national office for indigenous knowledge systems in 2006. Cameroon has a framework for the protection of inventions and innovations related to traditional medicine, and Ghana has a national policy on intellectual property rights.

Nigeria developed national legislation and a bill on intellectual property rights in 2006/07.

45. While these are some positive examples of legal initiatives that, in part, cover indigenous knowledge, most of the legal frameworks appear to be fragmentary and need to be more comprehensive. There is also widespread lack of coordination between government initiatives and government agencies on protecting indigenous knowledge and, at times, a duplication of efforts that results in conflicting policies and regulatory agreements.

D. Good practices

46. A celebrated case highlighting good practices is that of the San people of South Africa and their efforts to tackle the unauthorized use of their knowledge concerning the hoodia cactus plant, used to ward off hunger. In 1995, the South African Council for Scientific and Industrial Research, drawing on anthropological research from the 1930s, patented the hoodia plant's appetite-suppressing properties. By 1998, revenues from the licensing fee for developing and marketing the element as a slimming drug had reached $32 million.[22] The San alleged biopiracy and threatened legal action, including for violations of their right to property and equality. Following pressure from advocates working with the San, the Council agreed to share royalties with the San through a benefit-sharing agreement adopted in 2003. This solution demonstrates that with goodwill on all sides, mutually acceptable arrangements for access and benefit-sharing can be reached. The importance of intellectual property in securing future benefits was recognized by all parties, including the San.[23] In December 2008, the company that had received a licence to advance the hoodia patent suspended its hoodia project. As a result, it is not clear if there will be any benefits for the San.

47. An indigenous-driven good practice is the Masai intellectual property initiative that attempts to reclaim Masai ownership of its famous iconic cultural brand. The initiative aims to obtain licences from companies that use Masai indigenous knowledge. Initiatives to enhance community capacity, including awareness-raising and training, have been crucial in this regard. Under its Creative Heritage Project, WIPO assisted with training the Masai to document their indigenous knowledge.[24] These training-type initiatives should be encouraged.

48. The increase in community-based mapping is symptomatic of indigenous groups' concern over the non-recognition or misuse of their knowledge. Indigenous peoples have started to document their knowledge through mapping. In Cameroon, indigenous communities have been trained by non-governmental organizations to map their use of the forests in which they live. With technical support they have produced digitized maps of their traditional hunting and gathering areas as well as areas of cultivation. The maps remain the intellectual property of indigenous

[22] United Nations Development Programme, *Human Development Report 2004: Cultural Liberty in Today's Diverse World*, chap. 5, "Globalization and cultural choice", referenced in *State of the World's Indigenous Peoples* (United Nations publication, Sales No. 09.VI.13).

[23] Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy.

[24] See "Digitizing traditional culture", *WIPO Magazine* (June 2008).

communities, and serve as a focal point for discussions on land tenure and access rights over areas from which indigenous communities have been excluded.[18] Community mapping is also emerging as an important process in Kenya, where both the Endorois and the Ogiek have started mapping their lands and related indigenous knowledge. The Ogiek community map indicates, for instance, honey production in particular areas of their homelands.

V. Conclusion and recommendations

A. Conclusion

49. The increase in misappropriation and unauthorized use of indigenous knowledge has determined that managing indigenous knowledge, once a local task regulated by customary law, has become an international issue for indigenous peoples. A significant challenge facing indigenous peoples on a global scale is the misappropriation and use of their indigenous knowledge for commercial and other purposes. Indigenous knowledge has considerable commercial value, and while corporations and others are benefiting from indigenous knowledge, the traditional holders of the knowledge are rarely compensated. In recent years, some progress has been made towards new, ground-breaking instruments to protect indigenous peoples' traditional knowledge and traditional cultural expressions. Further progress is required as a matter of securing indigenous peoples' basic human rights. Indigenous peoples in the African region have a wealth of traditional knowledge, but the legal framework for protecting it is yet to be sufficiently established. While some positive examples of legal initiatives exist, most of the legal framework to date appears to be fragmentary and will need to be more comprehensive. The full and effective participation of indigenous peoples and their communities in any initiatives that may affect their indigenous knowledge needs to be ensured. Hence, effective partnerships are essential to finding solutions.

B. Recommendations

To the World Intellectual Property Organization

50. WIPO should adopt modalities that facilitate the full and effective participation of indigenous peoples in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore process, as well as in all other processes related to the work of the Intergovernmental Committee. WIPO should specifically focus on African indigenous representatives' participation as an affirmative action to increasing awareness of WIPO processes in the African region.

51. WIPO should work towards the adoption of a legally binding outcome document that reflects the core demands of indigenous peoples and their communities that is consistent with the United Nations Declaration on the Rights of Indigenous Peoples and with the full and equal participation of indigenous peoples.

52. WIPO is encouraged to develop, in consultation with the African Regional Intellectual Property Organization and indigenous peoples, culturally appropriate training classes for capacity-building for African indigenous communities. The

classes could focus on training in linkages between indigenous knowledge and economics, negotiation processes, elements of free, prior and informed consent processes, benefit-sharing models and dispute resolution. WIPO could also incorporate an accessible online course in traditional knowledge as part of its WIPO Academy offerings. Strategies for information dissemination will be critical in this regard.

To African States

53. African State delegations participating in the work of the WIPO Intergovernmental Committee should include the perspectives and voices of African indigenous peoples and their communities in this process.

54. African States should, in full consultation with indigenous peoples, adopt national measures to actively protect indigenous knowledge. Agreements should be reached on how sacred knowledge should be treated and how communities must be consulted, and indigenous peoples must play an active role in the protection, promotion and use of their knowledge. All legal and/or policy initiatives to protect and benefit the holders of indigenous knowledge need to recognize the holistic nature of this knowledge. These initiatives should be tailored to the specific needs and resource constraints of indigenous communities, and include capacity-building programmes, documentation initiatives and broader infrastructural developments, with the full and effective participation of the indigenous peoples.

55. African States should ensure that any development policies or programmes that target and affect indigenous communities recognize the important role that indigenous knowledge plays for the survival of communities, and that indigenous knowledge is fully integrated into policies and programmes.

56. African States should adopt measures to raise awareness among indigenous communities of the potential value of their knowledge, and develop strategies for promoting and securing opportunities for indigenous knowledge-based entrepreneurship in indigenous communities.

57. African States should inform indigenous peoples and their communities of any current and proposed research or bioprospecting activities to take place in their areas, and ensure that these activities are carried out in accordance with international standards on the rights of indigenous peoples.

58. African Governments are encouraged to provide training for government representatives and ministerial staff on indigenous peoples and the value of their knowledge for sustainable development.

To African indigenous peoples

59. In line with the good practice of the Masai intellectual property initiative, African indigenous peoples should increase their efforts to enhance community capacity, including awareness-raising and training on the potential value of their indigenous knowledge and measures available to protect their knowledge, and ensure that any use of their knowledge benefits their communities.

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Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress

Note by the secretariat

Pursuant to a decision of the United Nations Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 112), Edward John, a member of the Forum, undertook a study of the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, with reference to the Declaration, and particularly to articles 26 to 28, 32 and 40. The outcome of the study is hereby submitted to the Permanent Forum at its thirteenth session.

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Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress

I. Introduction

1. The members of the Permanent Forum examined the Doctrine of Discovery as a special theme during its eleventh session, which included the convening of a panel of international experts, the preparation of a conference room paper, statements from indigenous peoples from Africa, Asia, the Pacific, the Arctic, Central and South America and the Caribbean and North America[1] and recommendations in the final report of the Forum on the session (see E/2012/43, chap. III). The reach and impacts of the Doctrine are global.

2. There is a substantial body of scholarly work[2] on the historical foundations of the doctrine and the ongoing effects on indigenous peoples globally. It is therefore not the intention of the present study to repeat that valuable work, but rather to build upon it so as to create a better understanding of the doctrine and its continuing impacts. The challenge is to shift the paradigm. The Doctrine has been rejected by some international and domestic bodies but continues to have life. Its resilience remains because it is embedded in colonizing cultures and maintained in State laws, policies, negotiations and litigation positions.

3. The Doctrine of Discovery is based invalidly on the presumption of racial superiority of Christian Europeans.[3] It originated with the papal bulls issued during the so-called Age of Discovery in Europe. It was compounded by regulations, such as the *Requerimiento*, that emanated from royalty in Christian European States.[4] In all its manifestations, "discovery" has been used as a framework for justification to dehumanize, exploit, enslave and subjugate indigenous peoples and dispossess them of their most basic rights, laws, spirituality, worldviews and governance and their lands and resources. Ultimately it was the very foundation of genocide.[5]

4. Doctrines of superiority, such as discovery, have been repudiated as "racist, scientifically false, legally invalid, morally condemnable and socially unjust".[6] The

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[1] Available from www.docip.org.

[2] See, e.g., Robert J. Miller and others, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford/New York, Oxford University Press, 2012); Charles Geisler, "New terra nullius narratives and the gentrification of Africa's empty lands", (2012), *Journal of World Systems Research*, vol. 18, No. 1; Robert A. Williams, Jr., *Savage Anxieties: The Invention of Western Civilization* (New York, Palgrave Macmillan, 2012); Robert J. Miller, "The international law of colonialism: a comparative analysis", *Lewis & Clark Law Review*, vol. 15 (2011); and Steven T. Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, Colorado, Fulcrum Press, 2008).

[3] Steven T. Newcomb, "The evidence of Christian nationalism in federal Indian law: the Doctrine of Discovery, *Johnson v. McIntosh*, and plenary power", *New York University, Review of Law & Social Change*, vol. 20 (1993).

[4] Robert J. Miller and others, (see footnote 2 above).

[5] See, e.g., Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (New York, Oxford Publishing, 1990).

[6] Declaration, fourth preambular paragraph, "similarly, see the *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble.

prohibition against racial discrimination is a peremptory norm.[7] The Human Rights Council, in paragraph 5 of its resolution 18/15 on the incomptability between democracy and racism, "condemned" doctrines of superiority as "incompatible with democracy and transparent and accountable governance" (see A/66/53/Add.1, chap. I). For both indigenous peoples and States, there are compelling reasons to go beyond repudiation. It is essential to replace the colonial Doctrine of Discovery with contemporary international human rights standards and engage in just and collaborative processes of redress. High courts in various States have expressly discredited the doctrines of Discovery and of *Terra nullius*, which underpin the de facto dispossession of indigenous lands and laws.[8] Yet these same States continue applying those doctrines. Even State laws that affirm and protect indigenous land rights and legal orders are not being respected and implemented by these same States. Large "gaps" remain between State commitments to recognize indigenous rights and their full and effective implementation and realization.

5. The Secretary-General has stated that the United Nations Declaration on the Rights of Indigenous Peoples provides a principled framework "on which States can build or rebuild their relationships with indigenous peoples".[9] The Declaration is a universal, remedial human rights instrument. As described by the Expert Mechanism on the Rights of Indigenous Peoples, as a "normative expression of the existing international consensus regarding the individual and collective human rights of indigenous peoples, the Declaration provides a framework for action aiming at the full protection and implementation of the rights of indigenous peoples".[10]

6. The General Assembly, in paragraph 1 of its resolution 2621 (XXV), indicated that the continuation of colonialism is a crime which constitutes a violation of the Charter of the United Nations and the principles of international law. Colonial-era doctrine cannot continue to oppress and impoverish generations of indigenous peoples and deny them jurisdiction to exercise their indigenous laws and legal orders.

7. It is critical to examine how Crown sovereignty and underlying title could ever have legitimately crystallized through the "discovery" of indigenous peoples' lands and territories. The Doctrine must be unmasked so its manifestations are made visible. As Tracey Lindberg concluded, "Crown sovereignty could not replace Indigenous sovereignty just by virtue of non-Indigenous peoples settling in Indigenous territories and homelands ... you must assume Indigenous inability, absence, and invisibility in order to imagine the crystallization of Crown sovereignty and superior title".[11] In the different regions of the world, "assumed"

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[7] See the report of the Study Group of the International International Law Commission, entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" (A/CN.4/L.702), para. 33; and Antonio Cassese, *International Law* (Oxford/New York: Oxford University Press, 2001).

[8] *Mabo* v. *State of Queensland* (No. 2) (1992), 175 C.L.R. 1 (H.C.), paras. 28-29, 40 and 43 per Justice Brennan; and *Simon* v. *The Queen*, [1985] 2 S.C.R. 387.

[9] Message of the Secretary-General for the International Day of World's Indigenous People, 23 July 2008.

[10] Report of the Expert Mechanism on the Rights of Indigenous Peoples, final report of the study on indigenous peoples and the right to participate in decision-making (A/HRC/18/42), annex, advice No. 2 (2011), para. 4.

[11] Tracey Lindberg, "Contemporary Canadian resonance of an imperial Doctrine", in Robert J. Miller and others (see footnote 2 above). See also John Borrows, "Sovereignty's alchemy: an

sovereign powers continue to be abused by States that derived justification by these doctrines. As underlined by Robert A. Williams, "this blatantly racist European colonial-era legal doctrine continues to be used by courts and policy makers in the West's most advanced nation-States to deny indigenous peoples their basic human rights guaranteed under principles of modern international law".[12]

8. Every Member State must respect and apply the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations.[13] State reliance on the Doctrine of Discovery and the denial of indigenous sovereignty and self-determination are incompatible with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith, which are the core principles for interpreting and applying indigenous peoples' rights and the related State obligations affirmed in the Declaration (art. 46(3)). Here as well, the adoption of the Declaration by the General Assembly notwithstanding, the "gaps" between commitments and implementation continue to be significant.

9. With regard to land dispossessions, forced conversions of non-Christians, the deprivation of liberty and the enslavement of indigenous peoples, the Holy See reported that an "abrogation process took place over the centuries" to invalidate such nefarious actions.[14] Such papal renunciations do not go far enough. There is a pressing need to decolonize from the debilitating impacts and the ongoing legacy of denial by States of indigenous peoples' inherent sovereignty, laws, and title to their lands, territories and resources. At the same time, there is a growing movement among faith-based bodies to repudiate the doctrine of discovery.[15] In that context, the World Council of Churches and Canadian Quakers have both emphasized indigenous peoples' inherent sovereignty and title concerns.

II. Impacts of the Doctrine of Discovery

10. The impacts of the Doctrine of Discovery continue to be devastating, far-reaching and intergenerational. The Special Rapporteur on the rights of indigenous peoples, James Anaya, concluded in his report that "the colonial-era doctrine of discovery, when coupled with related doctrines of conquest and European racial superiority, was a driving force for atrocities committed against indigenous peoples on a global scale, with the consequences continuing to be felt" (see A/HRC/21/47, para. 5).

11. The Permanent Forum, in its report on the eleventh session, described some of the ongoing adverse effects in indigenous communities as relating to "health;

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analysis of *delgamuukw v British Columbia*" (1999), *Osgoode Hall Law Journal*, vol. 37, "What alchemy transmutes the basis of Aboriginal possession into the golden bedrock of Crown title?"

[12] Robert A. Williams, Jr., *Savage Anxieties: The Invention of Western Civilization* (New York, Palgrave Macmillan, 2012).

[13] Arts. 1(2) and 55 c; see also Declaration, preambular paras. 1-2, and arts. 1-3.

[14] Statement by the Permanent Observer Mission of the Holy See to the United Nations to the Permanent Forum at its ninth session, 27 April 2010.

[15] To date, statements have been issued by the World Council of Churches and denominations, including Episcopalian/Anglican, Unitarian, United Church of Canada and Religious Society of Friends (Quakers). See, e.g., www.oikoumene.org/en/resources/documents/executive-committee/2012-02/statement-on-the-doctrine-of-discovery-and-its-enduring-impact-on-indigenous-peoples.

psychological and social well-being; denial of rights and titles to land, resources and medicines; conceptual and behavioural forms of violence against indigenous women; youth suicide; and the hopelessness that many indigenous peoples experience, in particular indigenous youth" (see E/2012/43-E/C.19/2012/13, para. 5). The visual impacts of dispossession and oppression, such as the conditions in many indigenous communities and the resulting social problems, serve to perpetuate stereotypes. Racism and discrimination and notions of non-indigenous superiority, whether overt or otherwise, will continue so long as severe poverty remains in communities.

12. In the preamble to the outcome document of the Global Indigenous Preparatory Conference for the United Nations World Conference on Indigenous Peoples, which took place in Alta, Norway, from 8 to 13 June 2013 (see A/67/994, annex), the impacts of colonial doctrines are described by indigenous peoples as including the ongoing usurpation of indigenous peoples' lands, territories, resources, the destruction of indigenous political and legal institutions, discriminatory practices aimed at destroying indigenous cultures; the failure to honour treaties, agreements and other constructive arrangements with indigenous peoples and nations; genocide, the loss of food sovereignty and crimes against humanity.

13. The highest court of Canada has recognized the need for reconciliation of "pre-existing aboriginal sovereignty with assumed Crown sovereignty".[16] The Supreme Court has taken judicial notice of "such matters as colonialism displacement and residential schools",[17] which demonstrate how "assumed" sovereign powers were abused throughout history. The root cause of such abuse leads back to the Doctrine of Discovery and other related fictitious constructs, which therefore must be addressed.

14. As affirmed in the Declaration, the ongoing denial by States of indigenous peoples' sovereignty leads to a denial of their human rights. These include, among other things, the right of self-determination, including the right to self-government through their own laws and jurisdiction (arts. 3, 4, 5, 33 and 34); right to own, develop and control their lands, territories and resources (art. 26); and right to development in accordance with their own priorities (arts. 20 and 23) and treaties (art. 37). As a result of colonial doctrines and policies, indigenous peoples are among the most marginalized and disadvantaged in the world. The General Assembly endorsed the following statement: "Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development".[18] The United Nations Children's Fund (UNICEF) has declared that "poverty is a denial of human rights and human dignity".[19]

III. Redress: implementation of a human rights-based approach

15. In order to redress the ongoing debilitating consequences of the doctrine of discovery, it is imperative that a human rights-based approach be adopted, which affirms that "indigenous peoples are equal to all other peoples" and that "all peoples

[16] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.
[17] *R.* v. *Ipeelee*, 2012 S.C.C. 13, para. 60.
[18] General Assembly resolution 66/288, annex, para. 2.
[19] UNICEF, *Poverty Reduction Begins with Children*, New York, March 2000.

contribute to the diversity and richness of civilizations and cultures".[20] The Doctrine of Discovery was used as a tool to justify conferring upon States the "exclusive power to extinguish" indigenous rights on an ongoing basis.[21] The pre-existing inherent sovereignty of indigenous peoples was not justly considered. In various parts of the world, domestic courts have aided States not only by validating such destructive acts, but also by extinguishing indigenous rights through judicial rulings.[22]

16. Indigenous peoples' inherent rights are human rights and are not subject to extinguishment or destruction in form or result.[23] According to United Nations treaty bodies, the extinguishment of indigenous peoples' rights is incompatible with their right of self-determination.[24] Further, the Committee on Economic, Social and Cultural Rights concluded that "policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued".[25] The International Court of Justice has ruled that "great weight" should be ascribed to the interpretations adopted by independent bodies established specifically to supervise the application of human rights treaties.[26] The Court added that the same is true in respect of supervisory regional bodies, such as the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights. The United Nations and regional bodies are increasingly using the Declaration to interpret and apply indigenous peoples' rights and related State obligations in existing treaties.

17. Human rights are generally relative in nature and not absolute. The Declaration affirms, in article 46, paragraph 2, that the exercise of the rights in the Declaration shall be "subject only to such limitations as are ... in accordance with international human rights obligations ... and strictly necessary solely for the purpose of securing due recognition and respect for the rights ... of others and for meeting the just and most compelling requirements of a democratic society".[27] The Special Rapporteur on the rights of indigenous peoples underlined in paragraph 29 of his report on the situation of indigenous peoples in Australia (A/HRC/15/37/Add.4) that the "extinguishment of indigenous rights in land by unilateral uncompensated acts" is "incompatible with the Declaration, as well as with other international

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[20] Declaration, preambular paras. 2 and 3.

[21] *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

[22] *Tsilhqot'in Nation* v. *British Columbia*, 2012 B.C.C.A. 285 (broad territorial claims to title are "antithetical to the goal of reconciliation"). The case is currently under appeal to the Supreme Court of Canada.

[23] Human rights instruments do not permit the destruction of human rights. See, e.g., identical art. 5(1) of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights; and art. 45 of the Declaration.

[24] See, e.g., concluding observations of the Human Rights Committee: Canada (CCPR/C/79/Add.105), para. 8.

[25] E/C.12/1/Add.31, para. 18.

[26] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*. The Court indicated that the jurisprudence of treaty bodies would include their "General Comments" and their concluding observations regarding individual States Parties.

[27] See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, twenty-seventh activity report, 2009, annex 5, paras. 213-215.

instruments".[28] With regard to the lands, territories and resources of indigenous peoples "taken ... or damaged without their free, prior and informed consent", the Declaration, in article 28, affirms their right to redress. This includes restitution "or, when this is not possible, just, fair and equitable compensation".

18. The Declaration affirms that indigenous peoples and individuals have the "right not to be subjected to forced assimilation or destruction of their culture" (art. 8(1)). In this regard, States have a duty to provide effective mechanisms for the prevention of, and redress for, any action which has the aim or effect of "depriving them of their integrity as distinct peoples, or of their cultural values" or "dispossessing them of their lands, territories and resources" (art. 8(2)). The Special Rapporteur stated in paragraph 45 of his report (A/64/338) that the Declaration also affirms that indigenous peoples have the right to cultural integrity, "including cultural and spiritual objects, languages and other cultural expressions"[29] which is intimately linked to their lands, territories and resources. The study by the Expert Mechanism on the Rights of Indigenous Peoples states, in its advice No. 5 (see A/HRC/24/50, annex), that the Declaration "affirms the right to the integrity of their lands and territories" (arts. 25-32), which includes protection of the environment.

19. The International Law Association concluded that "indigenous peoples have the rights to reparation and redress for the wrongs suffered. This right amounts to a rule of customary international law to the extent that it is aimed at redressing a wrong resulting from a breach of a right that is itself part of customary international law. In fact, redress is an essential element for the effectiveness of human rights".[30] Examples of customary international law in the Declaration include, among other things, the general principle of international law of *pacta sunt servanda* ("treaties must be kept", fourteenth preambular para. and art. 37); the prohibition against racial discrimination (art. 2); the right to self-determination (art. 3); the right to one's own means of subsistence (art. 20); and the right not to be subjected to genocide (art. 7). The Association adds that "States must comply — pursuant to customary and, where applicable, conventional international law — with the obligation to recognize, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources".[31]

20. In its resolution 67/157, the General Assembly recognized that universal realization of the right of all peoples to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights.

IV. Redress: processes and mechanisms

21. In order to achieve redress in the global indigenous context, effective processes and mechanisms will be required at international, regional and domestic levels. Currently, for example, there are no effective international mechanisms for

[28] See *Case of Sawhoyamaxa* v. *Paraguay*, Inter-American Court of Human Rights (Ser. C) No. 146 (2006), para. 128.

[29] See arts. 11-16 and 31 of the Declaration.

[30] International Law Association, "Rights of indigenous peoples", Interim report of The Hague Conference (2010).

[31] "Rights of indigenous peoples", final report of the Sofia Conference (2012), (Conclusions and Recommendations).

remedying State violations of treaties, agreements and other constructive arrangements. The Inter-American Court has confirmed that "it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it".[32] Reparations "consist of measures that tend to make the effects of the violations committed disappear",[33] including measures such as restitution.

22. The International Law Association has concluded that "States must comply with the obligation — according to customary and, where applicable, conventional international law — to recognize and fulfil the right of indigenous peoples to reparation and redress for the wrongs they suffered, in particular their lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress — established in conjunction with the peoples concerned — must be available and accessible in favour of indigenous peoples."[34] Any ongoing actions based in discovery are in violation of States' international obligations. Redress must include decolonization processes that effectively restore indigenous peoples' sovereignty and jurisdiction in contemporary contexts and achieve genuine reconciliation.

23. In the global perspective, different processes of redress are required for different political and historical contexts. Within the United Nations, trust territories and Non-Self-Governing Territories have been the subject of special decolonization processes, which have their own particular limitations and serious injustices.[35] In countless other situations worldwide, indigenous peoples are striving for effective reconciliation in diverse ways. Within existing States, the key issues urgently requiring resolution are those relating to making jurisdictional space for indigenous sovereignty,[36] and self-determination, including the effective operation of distinct indigenous legal orders over their territories.

24. According to the study on the rights of indigenous peoples and truth commissions and other truth-seeking mechanisms on the American continent (E/C.19/2013/12), truth commissions are an essential tool in identifying the causes of serious human rights violations, including economic, social and cultural rights; determining patterns of abuse; and preventing a repetition of similar acts. The study states that "if properly implemented, with strong guarantees of independence and honest leadership, the commissions could help to strengthen recognition of the sovereignty, identity and perspective of indigenous peoples and respect of their civil, political, economic, social, spiritual and cultural rights, as well as the right to ancestral lands and natural resources" (ibid., para. 71).

25. Many States continue to ignore human rights challenges to their "assumed" sovereignty over indigenous peoples and their territories. Former Chief Justice Lance Finch of the British Columbia Court of Appeal emphasized

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[32] *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001, Ser. C No. 79 (2001), para. 163.

[33] *Case of the Indigenous Community Yakye Axa*, Inter-American Court of Human Rights, Ser. C. No. 125 (Judgment) 17 June 2005, para. 182.

[34] International Law Association, 2012 (see footnote 31 above).

[35] See, e.g., E/C.19/2013/12.

[36] Courtney Jung, "Transitional justice for indigenous people in a non-transitional society", International Center for Transitional Justice, October 2009, at p. 3: "one of the historic injustices that lie at the heart of indigenous identity is loss of sovereignty. Indigenous peoples are defined in part by the fact that their sovereignty was not recognized by colonial powers that appropriated territory and sovereignty under the doctrine of *terra nullius*."

> "To guard against imbalance and resulting injustice, we must conceive of reconciliation, in the legal context as well as in social and political terms, as a two-way street: just as the pre-existence of aboriginal societies must be reconciled with the sovereignty of the Crown, so must the Crown, in its assertion of sovereignty, equally be reconciled with the pre-existence of aboriginal societies".[37]

26. As affirmed in article 40 of the Declaration, "indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights". Indigenous rights to just and fair procedures and to effective remedies for all infringements apply not only to States, but also to business enterprises and other third parties. Under international law, States must take positive measures to ensure the indigenous right to an effective remedy not only against their own actions, but also against the acts of other parties within their own State.[38] The Permanent Forum, in its report on the eleventh session, reiterated that international human rights law, including norms on equality and non-discrimination demand that States rectify past wrongs caused by such doctrines, including the violation of the land rights of indigenous peoples, through law and policy reform, restitution and other forms of redress for the violation of their land rights (E/2012/43-E/C.19/2012/13, para. 7).

V. Role of domestic courts

27. Although some domestic courts acknowledge the colonial origins of "assumed" State sovereignty over indigenous peoples and their traditional territories, they have failed to give full and fair consideration to pre-existing indigenous sovereignty.[39] State sovereignty is not absolute.[40] Within their respective countries, domestic courts generally have legal authority and a constitutional responsibility to determine and enforce constraints on State sovereignty so as to ensure jurisdictional space for indigenous sovereignty, laws and legal orders. The extraterritorial actions of States are also constrained by their international human rights obligations.[41]

28. In *Mabo et al.* v. *State of Queensland* [No. 2], in striking down the doctrine of *terra nullius* in Australia, it was held that "it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination".[42] The same rationale must apply to the whole Doctrine of

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[37] Hon. Lance Finch, "The duty to learn: taking account of indigenous legal orders in practice", Continuing Legal Education Society of British Columbia Indigenous Legal Orders and the Common Law Conference, 15 November 2012.

[38] See, e.g., CCPR/C/21/Rev.1/Add.5, para. 6.1.

[39] See, e.g., Brian Slattery, "Aboriginal sovereignty and imperial claims", *Osgoode Hall Law Journal*, vol. 29: "native American peoples held sovereign status and title to the territories they occupied at the time of European contact and that this fundamental fact transforms our understanding of everything that followed".

[40] A/47/277, para. 17: "The time of absolute and exclusive sovereignty ... has passed; its theory was never matched by reality."

[41] See, e.g., A/60/350, para. 30.

[42] *Mabo et al.* v. *State of Queensland* [No. 2], (1992) 107 A.L.R. 1 (High Court of Australia), per Brennan J.

Discovery. At the same time, there is an ongoing reluctance among States to eliminate all reliance on the Doctrine.[43] "Assumed" State sovereignty is being abused in different regions of the world, especially when indigenous lands, territories and resources are involved.[44] Thus it is urgent for domestic courts to repudiate and provide remedies for harmful colonial doctrines and further elaborate a judicial framework that is consistent with the Declaration and other contemporary international human rights law. In addition, there is a need for indigenous perspectives in judicial decision-making, through the appointment of indigenous justices and the maintenance, support and development of indigenous courts with jurisdiction to make decisions in accordance with indigenous laws, cultures and international human rights standards.

VI. Need for human rights education

29. Genuine reconciliation is not possible without a clear understanding of, and sensitivity to, past and present injustices relating to indigenous peoples. In view of the legal fictions generated by "discovery" and other related doctrines, there is an urgent need to ensure that curricula include the historical realities of the founding of modern nation States. Students at all levels should learn about the impacts of such doctrines and the need for justice and redress. Further, in view of the entrenched and often unconscious ways the doctrines are embedded in State legal and political culture, there is a need for education of State law makers and decision makers.

30. National human rights institutions can play a role by developing and promoting human rights education through culturally appropriate materials. Such materials must be developed in consultation and cooperation with indigenous peoples. In the United Nations Declaration on Human Rights Education and Training (General Assembly resolution 66/137, annex), the General Assembly affirmed the importance of such education and training and the roles of States and other actors in their implementation. Human rights education materials should also be created and distributed at the international level through the Office of the United Nations High Commissioner for Human Rights and appropriate United Nations agencies and bodies, including the Permanent Forum and the Expert Mechanism on the Rights of Indigenous Peoples.

31. The Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, emphasized in her report that "it is necessary to avoid the biased or flawed premise that judicial actors have already obtained the necessary knowledge that will enable them to perform their duties in an impartial manner".[45] Such legal professionals should be requested to take courses on international human rights law, including the Declaration. These courses should be made widely available, especially by bar associations and universities.

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[43] For example, A/HRC/21/47/Add.1, para. 16: "the use of notions of discovery and conquest to find Indians rights diminished and subordinated to plenary congressional power is linked to colonial era attitudes toward indigenous peoples that can only be described as racist".

[44] Ibid., para. 34: "natural resource extraction and development on or near indigenous territories had become one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of the challenges to the full exercise of their rights".

[45] A/HRC/20/20, para. 94 (conclusions). "Judicial actors" are said to include: judges, magistrates, prosecutors, public defenders and lawyers.

VII. Conclusions and recommendations

32. The Doctrine of Discovery is significant globally not only for abuses in the past, but also for its ongoing far-reaching consequences. Such colonial doctrines must not prevail in practice over human rights, democracy and the rule of law. In this context, the implementation gap must be addressed fully and effectively so that such doctrines are wholly eliminated. According to Robert J. Miller, "discovery is a dangerous fiction that if not tackled will continue to undermine attempts to create a better, reconciled Crown-Indigenous future".[46]

33. Domestically, fundamental changes must be reflected through constitutional and legislative reforms, policies, and government negotiation mandates in regard to indigenous peoples. State Governments must be constrained from the illegal taking of indigenous lands, territories and resources justified by these doctrines.[47]

34. Processes and mechanisms of redress, as well as independent oversight, are required at international, regional and domestic levels. Decolonization processes must be devised in conjunction with indigenous peoples concerned and compatible with their perspectives and approaches. Such processes must be fair, impartial, open and transparent, and be consistent with the Declaration and other international human rights standards.

35. Such processes should encourage peace and harmonious and cooperative relations between States and indigenous peoples. Where desired by indigenous peoples, constitutional space must be ensured for indigenous peoples' sovereignty, jurisdiction and legal orders.

36. Within their respective mandates, United Nations treaty bodies and regional human rights bodies have an important role to play in establishing relevant standards and jurisprudence. Similarly, the Permanent Forum, the Expert Mechanism on the Rights of Indigenous Peoples and United Nations Special Rapporteurs should play a role. The universal periodic review should also be used to encourage States to engage together with indigenous peoples in processes of decolonization.

37. The upcoming World Conference on the Rights of Indigenous Peoples provides an opportunity for further examination of the topic. The United Nations and States will have an appropriate and timely occasion in the outcome document to wholly repudiate colonial doctrines and to commit to processes of redress.

38. History cannot be erased. Its course, however, can be changed to ensure the present and future well-being, dignity and survival of indigenous peoples. Dignity and respect for human rights must be guaranteed, especially in the light of existing vulnerabilities. There must be a full and honest account of the past, in order to ensure that colonial doctrines do not continue to be perpetuated. A clear shift of paradigm is critical from colonial doctrines to a principled human rights framework, consistent with the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law.

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[46] Robert J. Miller and others (see footnote 2 above).

[47] See, e.g., E/C.19/2013/20.

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Permanent Forum on Indigenous Issues
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Special theme: "Principles of good governance consistent with the United Nations Declaration on the Rights of Indigenous Peoples: articles 3 to 6 and 46"

Study on best practices and examples in respect of resolving land disputes and land claims, including consideration of the National Commission on Indigenous Peoples (Philippines) and the Chittagong Hill Tracts Land Dispute Resolution Commission (Bangladesh) and the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights

Note by the secretariat

At its eleventh session, the Permanent Forum on Indigenous Issues, decided to appoint Raja Devasish Roy and Simon William M'Viboudoulou, members of the Forum, to undertake a study on best practices and examples in respect of resolving land disputes and land claims, including consideration of the National Commission on Indigenous Peoples (Philippines) and the Chittagong Hill Tracts Land Dispute Resolution Commission (Bangladesh) and the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (E/2012/43 and Corr.1, para. 111). The outcome of the study, undertaken by Mr. Roy, is hereby submitted to the Permanent Forum at its thirteenth session.

* E/C.19/2014/1.

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Study on best practices and examples in respect of resolving land disputes and land claims, including consideration of the National Commission on Indigenous Peoples (Philippines) and the Chittagong Hill Tracts Land Dispute Resolution Commission (Bangladesh) and the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights

I. Research methodology

1. After his term as a member of the Permanent Forum on Indigenous Issues ended in 2013, Simon William M'Viboudoulou was unavailable for the present study; the study was therefore completed by Raja Devasish Roy. For this reason, the section on the African region was excluded because the author is not familiar with the African situation. The study is based upon both the author's direct participation in events related to the subject matter and research into secondary sources. With regard to the Chittagong Hill Tracts, the author has drawn upon his personal experience as a traditional circle chief, a human rights worker, an advocate at the Supreme Court of Bangladesh (acting as legal counsel in some of the cases mentioned in this report) and a Minister of State in the Caretaker Government of Bangladesh in 2008 (for Environment and Forests and Chittagong Hill Tracts Affairs). With regard to the Philippines, the author has made use of his experience as a member of the Permanent Forum and his participation in international and other meetings and discussions with government officials and indigenous peoples' representatives. The author is grateful for the insights gained in discussions with concerned indigenous individuals and government officials. However, since these were not formal interviews, the views of the individuals concerned are neither referenced nor cited. The views expressed in this report are solely those of the author.[1]

II. Land rights struggles, international human rights law and legal and administrative reforms in Asia

A. Indigenous peoples' land rights struggles and legal and administrative reform concerning land rights, land claims and land dispute resolution

2. Struggles to establish land rights are at the core of indigenous peoples' movements worldwide; as Erica-Irene A. Daes has noted, land and resources are essential to their survival, their identity, their dignity and their social and cultural integrity (see E/CN.4/Sub.2/1997/17 and Corr.1 and E/CN.4/Sub.2/2002/23). It has been said that indigenous peoples' relationship with their lands and territories is of

[1] The author is extremely grateful for the assistance provided by Uchacha-A Chak of the PRO 169 project of the International Labour Organization (ILO) country office in Bangladesh.

"special importance for their cultures and spiritual values and ultimately for their continued existence as distinct peoples".[2]

3. Land is a major source of conflict involving indigenous peoples in several regions of the world. These conflicts, as well as the relationship between dispossession of indigenous peoples from their lands and the circumstances of their marginalization and underdevelopment and of the discrimination against them, have been extensively studied by researchers, including under United Nations auspices.[3] Conversely, adequate State recognition of indigenous land claims and the equitable resolution of land disputes involving indigenous peoples have fostered peace, stability and sustainable development in several parts of the world, including former conflict-ridden areas such as north-eastern India, Myanmar, the Philippines, Bangladesh (to an extent), Nicaragua and the Plurinational State of Bolivia.

4. Asia is home to approximately 70 per cent of the world's 370 million indigenous peoples, with a number of groups denied their customary and other land rights.[4] So-called development projects, including dams and "forestry" projects, mining and other extractive industries, population transfer and militarization are among the major causes of such denial. At the same time, over the last few decades there have been legal and policy initiatives in a number of countries in Asia that have resulted in the formal acknowledgement of indigenous peoples' rights, including custom-based and other land rights.[5] Among these initiatives are the developments in the Chittagong Hill Tracts region of Bangladesh and in the Philippines.

5. In the Philippines, the Indigenous Peoples' Rights Act of 1997 was passed in accordance with the Philippines Constitution of 1987, facilitating the formal recognition of indigenous peoples' rights to cultural identity, integrity and self-government and their right to their ancestral domains and lands. In the Chittagong Hill Tracts region of Bangladesh, after decades of armed conflict, an accord was reached in 1997 to end the conflict that acknowledged the need to provide for the rehabilitation of those affected, to strengthen the self-government systems of the region and to provide for the equitable resolution of land-related disputes.

6. Other relevant examples of substantive legislation on indigenous peoples' roles in self-government, legislation, development and the administration of justice include constitutional stipulations concerning states in north-eastern India and in Sabah and Sarawak States in eastern Malaysia, supplemented with federal and provincial legislative and executive measures. The present study focuses on the assessment of a few selected examples of best practices of resolving land disputes and land claims from Asia, including the Chittagong Hill Tract region of Bangladesh and in the Philippines. In the process, it briefly mentions other similar cases in Asia.

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[2] International Land Coalition (ILC), ILC's Approach to Indigenous Issues (Rome, 2013).

[3] See, for example, the study prepared by José Martínez Cobo in the early 1980s for the Commission on Human Rights Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations* (United Nations publication, Sales No. E.86.XIV.3) and the reports prepared for the Subcommission by Prof. Daes.

[4] Land Watch Asia, The Prolonged Struggle for Land Rights in Asia: A Regional Overview, 2013.

[5] R. D. Roy, *Traditional Customary Laws and Indigenous Peoples in Asia* (London, Minority Rights Group International, 2005).

B. Indigenous peoples' land rights and international human rights law

7. The concept of indigenous peoples' right to land includes matters of territory and natural resources. This is reflected in the Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO). Convention No. 107 mentions "habitual territories" (art. 12 (1)), while Convention No. 169 refers to "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories ... in particular the collective aspects of this relationship" (art. 13 (1)). Convention No. 169 clarifies that the term lands "shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use" (art. 13 (2)). It gives special emphasis to the participation of indigenous peoples in the "use, management and conservation of these resources", including "mineral or subsurface resources or rights of other resources pertaining to lands" (art. 15).

8. The United Nations Declaration on the Rights of Indigenous Peoples (hereafter "the Declaration") follows the spirit of the ILO conventions. It uses the phrases "lands, territories, waters and coastal seas and other resources" (art. 25), "lands, territories and resources" (arts. 26 and 28), and "lands or territories" (arts. 2 and 30). The Declaration adopts a cultural and intergenerational approach to land rights. Its land-related provisions include recognition of land and territorial rights; safeguards against militarization, resettlement and alienation; and stipulations on inclusive, fair and just redress mechanisms, including restitution and compensation.

9. It has been stated that indigenous peoples' rights are not a special category of rights, and that the Declaration and Convention No. 169 "do not extend or invent any 'new rights'. On the contrary, the two instruments are articulations of universal human rights, as they apply to indigenous peoples. This means that they contextualize universal rights, which states are bound to respect, protect, and fulfil, to the situation of indigenous peoples by taking the collective aspects of these rights into account in order to overcome the historical injustices and current patterns of discrimination that indigenous peoples face."[6]

10. Other international treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, also contain provisions that are directly relevant to the land rights of indigenous peoples.

[6] B. Feiring, Indigenous Peoples' Rights to Lands, Territories and Resources (Rome, ILC, 2013).

III. Best practices in respect of resolving land disputes and land claims in the Chittagong Hill Tracts, Bangladesh

Discrimination, land alienation, armed conflict, and the Chittagong Hill Tracts Accord of 1997

11. The Chittagong Hill Tracts region in south-eastern Bangladesh shares international boundaries to its north, east and south with India (Tripura and Mizoram States) and Myanmar (Chin and Rakhine States). It is separated from the Bay of Bengal to its west by the coastal district of plains Chittagong (not to be confused with the Chittagong Hill Tracts). The three hill districts of Rangamati, Bandarban and Khagrachari constitute the Chittagong Hill Tracts, covering 13,181 km^2, with a population of 1,598,231, of whom 53 per cent are "tribal", as estimated by the national census of 2011.

12. The Chittagong Hill Tracts are distinct from the rest of the country on account of their hilly and mountainous terrain, forests, their unique constitutional and administrative history, and their indigenous inhabitants. The indigenous peoples include Bawm, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mro, Pangkhua, Tanchangya and Tripura. These peoples are ethnic, linguistic and religious minorities within Bangladesh. Physically, they are more similar to south-east Asian peoples than most South Asians. They adhere to Buddhist, Hindu and Christian or traditional indigenous faiths, and most of them speak Tibeto-Burman languages. In contrast, the majority of the Bangladeshi population speaks Bengali, an Indo-Aryan or Indo-European language, belongs to the Islamic faith, and is ethnically closer to neighbouring countries to the west of Bangladesh than to its neighbours to the north, east and south-east. The region's semi-autonomous administrative system combines elective, bureaucratic and traditional institutions and functionaries.[7]

13. The traditional occupation of the indigenous peoples of the Chittagong Hill Tracts was shifting cultivation, known locally as *jum*, giving rise to the generic name of the indigenous peoples and population, Jumma or Jummo. Today, non-land-based occupations are also pursued, in addition to shifting cultivation.[8] The Jummas' social, cultural and spiritual existence and identity as distinct peoples are closely intertwined with their ancestral lands and territories.

14. Major political and economic events have shaped the region's history and caused fundamental demographic and ecological changes. In the nineteenth century, the British Governments attached the Chittagong Hill Tracts to Bengal, in violation of the nation-to-nation treaty of 1787 between the Chakma king and the British Governor-General.[9] This was followed by the further erosion of autonomy and

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[7] P. Martin, Institutional Capacity Building: A Review of the CHT Institutions of Governance (Rangamati, Bangladesh, United Nations Development Programme, Chittagong Hill Tracts Development Facility, 2004).

[8] R. D. Roy, "Occupations and economy in transition: a case study of the Chittagong Hill Tracts", in ILO, *Traditional Occupations of Indigenous and Tribal Peoples: Emerging Trends* (Geneva, 2000).

[9] A. M. Serajuddin, "The rajas of the Chittagong Hill Tracts and their relations with the Mughals and the East India Company in the eighteenth century", in *Journal of the Pakistan Historical Society*, vol. XIX, part 1 (1968); S. B. Qanungo, *Chakma Resistance to British Domination (1772-1798)* (Qanungopara, Chittagong, 1998); W. Van Schendel, W. Mey and A. K. Dewan, eds., *The Chittagong Hill Tracts: Living in a Borderland* (Bangkok, White Lotus Press, 2000).

large-scale and disruptive development projects, including the commissioning of a hydroelectric dam in 1960, during the period before the independence of Bangladesh (1947-1971), which destroyed ancestral homes, flooded two fifths of the region's prime paddy lands and displaced one third of the region's indigenous population.[10]

15. After Bangladesh became independent from Pakistan in 1971, following a nine-month-long armed struggle, the most disruptive events in the Chittagong Hill Tracts were State discrimination, intense militarization, armed movements for self-rule and a State-sponsored population transfer programme. These events led to gross human rights violations by State security forces, which have been minutely documented by several United Nations mechanisms (see, e.g., E/C.19/2011/6) and international human rights organizations.[11] From 1979 to 1984/85, between 200,000 and 450,000 Bengali Muslim migrants were resettled in the Chittagong Hill Tracts, leading to ethnic conflicts, internal displacement and a mass exodus of about 100,000 indigenous people to neighbouring India; most of them were repatriated in the 1990s, but many still not rehabilitated today.[12] Rehabilitation and fair resolution of land disputes therefore remain among the major causes of frustration and dissatisfaction among the indigenous peoples of the Chittagong Hill Tracts.

16. After negotiations spanning more than a decade, on 2 December 1997, an accord on peace, self-government and rehabilitation was signed between the major regional political party of the indigenous peoples, the Parbatya Chattagram Jana Sanghati Samiti, and the Government of Bangladesh. The post-Accord package led to (a) the formation of the Ministry for Chittagong Hill Tracts Affairs; (b) the establishment of the Chittagong Hill Tracts Regional Council; (c) the strengthening of the three district-level councils; (d) the reiteration and strengthening of the role of State-recognized traditional indigenous institutions; (e) the formation of a commission on land to resolve land-related disputes; and (f) the establishment of civil and criminal courts independent from the regional and district administrations.

17. The constitutionality of the Chittagong Hill Tracts Regional Council Act, 1998 and some provisions of the Hill District Councils (Amendment) Acts of 1998 were challenged in the High Court Division of the Supreme Court and declared illegal, but pending appeal in the Appellate Division, the ruling of the High Court Division has been stayed.[13] The major land-related provisions of the accord include: (a) transfer of land management to district councils; (b) reiteration and reintegration

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[10] D. E. Sopher, "Population dislocation in the Chittagong Hills" in *Geographical Review*, vol. LIII, No. 3 (July 1963).

[11] *Militarization in the Chittagong Hills Tract, Bangladesh: The Slow Demise of the Region's Indigenous Peoples*, International Work Group for Indigenous Affairs (IWGIA) report 14, (Copenhagen, IWGIA, Organising Committee Chittagong Hill Tracts Campaign and Shimin Gaikou Centre, 2012); Amnesty International, "Bangladesh: indigenous peoples engulfed in Chittagong Hill Tracts land conflict", press release, 12 June 2013.

[12] A. Mohsin, The Politics of Nationalism: The Case of Chittagong Hill Tracts, Bangladesh (Dhaka, University Press, 1997); S. Adnan, Migration, Land Alienation and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts of Bangladesh (Dhaka, Research and Advisory Services, 2004); R. D. Roy, "The population transfer programme of 1980s and the land rights of the indigenous peoples of the Chittagong Hill Tracts", in S. Bhaumik and others, eds., Living on the Edge: Essays on the Chittagong Hill Tracts (Kathmandu, South Asia Forum for Human Rights, 1997).

[13] *Mohammad Badiuzzaman and another* v. *Bangladesh and others* (2010), *Bangladesh Law Chronicles*, vol. 15. This author was one of the legal counsels in this case, as well as in other cases mentioned in the study.

of the traditional indigenous institutions; (c) rehabilitation of the international Jumma refugees and the internally displaced indigenous people; (d) cancellation of illegal land leases of non-residents; (e) resolution of land disputes by a Commission on Land; and (f) grants of land titles to landless indigenous people (E/C.19/2011/6).

18. Following several visits to the Chittagong Hill Tracts from 2011 to 2013, Amnesty International made the following observation about land issues: "Almost all those who Amnesty International met while conducting research for this report over two years — whether men or women, Bengali settlers, Pahari villagers or leaders, or army/government officials — felt that addressing the land issue was central to resolving many of the problems in the Chittagong Hill Tracts today."[14]

19. Other crucial elements of the Chittagong Hill Tracts Peace Accord, including on demilitarization, devolution and rehabilitation, have remained largely unimplemented or underimplemented, as attested to by several studies;[15] one such study was conducted by a former member of the Permanent Forum and submitted to its tenth session in 2011. The Permanent Forum made some recommendations at that session, including that the Department of Peacekeeping Operations prevent military personnel and units that are violating human rights from participating in international peacekeeping activities under the auspices of the United Nations; and that the Government of Bangladesh declare a timeline and outline modalities of implementation of the Accord (E/2011/43 and Corr.1, para. 102).

Chittagong Hill Tracts Land Disputes Resolution Commission

20. The Chittagong Hill Tracts Land Disputes Resolution Commission (hereafter "Land Commission" was first established in 1999 on the basis of administrative guidelines, which were later replaced by the Chittagong Hill Tracts Land Disputes Resolution Commission Act (Act 53 of 2001). It was envisaged that the Commission would provide quick, inexpensive, fair and sustainable remedies for land disputes in the Chittagong Hill Tracts. The 2001 Act followed the spirit of the 1997 Accord, but not its letter. Its structure and mandated functions are, however, compatible with both the Accord and the Declaration, particularly articles 25-30.

21. Although central to safeguarding indigenous land rights, the functions of the Land Commission need to be assessed in conjunction with corresponding advances with regard to other land-related measures mentioned in the 1997 Accord and the ability of the specific self-government institutions of the Chittagong Hill Tracts, including traditional institutions, to play the roles envisaged in the region's laws and the Accord. The Commission is comprised of a chair, a retired Supreme Court judge; a senior civil servant; and indigenous persons representing specific councils of the Chittagong Hill Tracts and the traditional chiefs, the latter being regarded as repositories of in-depth knowledge about land use and land rights based upon local laws, customs, conventions and practices. Section 6 (1) (b) of Act 53 of 2001 empowers the Commission to declare land grants illegal and to reinstate possession, in accordance with the "laws and customs" of the Chittagong Hill Tracts. This

[14] Amnesty International, Pushed to the Edge: Indigenous Rights Denied in Bangladesh's Chittagong Hill Tracts (London, 2013).

[15] R. D. Roy, "The discordant accord: challenges in the implementation of the Chittagong Hill Tracts Accord of 1997", in M. Bolijes, ed., *Implementing Negotiated Agreements: The Real Challenge to Intra-State Peace* (The Hague, T. M. C. Asser Press, 2007); and Adnan, Migration, Land Alienation and Ethnic Conflict.

follows the spirit of article 13 (1) of ILO Convention No. 169, which emphasizes respect for the cultural and spiritual values of indigenous peoples in relation to their lands and territories, and article 26 (3) of the Declaration, which underscores that the recognition of indigenous land rights must respect "the customs, traditions and land tenure systems of the indigenous peoples concerned".

22. Act 53 of 2001 vests the Commission with the authority of a civil court of law, with full executive backing of the State, and stipulates that its decisions will be final, with no provisions for appeal. The option of judicial review by the Supreme Court, however, remains open. This law is in conformity with article 27 of the Declaration, which reads:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

23. Despite the positive aspects of the Commission, it has been dysfunctional since its inception in 1999. Disagreements between the last Chair and indigenous members made matters worse.[16] However, the most important factor behind its stagnancy is the inconsistency of Act 53 of 2001 with the 1997 Accord, including vesting excessive authority in its Chair and uncertainties regarding its jurisdiction and decision-making process.[17] Other factors include the lack of adequate human resources. Proposals to amend the law were sent by the Chittagong Hill Tracts Regional Council, which is mandated by law to advise the Government on legislation for the Chittagong Hill Tracts, to successive Governments from the early 2000s up to 2012. After a long and arduous process of negotiation, the Government finally agreed, in July 2013, to amend the 2001 Act.[18] However, despite agreement on most contentious issues and Cabinet approval of a draft bill, by September 2013 it had become reasonably clear that the process of the bill's passage was frozen, hopefully only temporarily.[19] It is widely believed that this was caused by "spoilers" — discriminatory and undemocratic elements within the civil and military bureaucracy of the Government. On 5 January 2014, national parliamentary elections were held, but without the participation of the major opposition party, the Bangladesh Nationalist Party. It is hoped and expected that the post-election Government that was formed on 13 January 2014, and again led by the party that negotiated the accord, the Bangladesh Awami League, will keep its pledge on the matter.

24. Distinct from the functions of the Commission, but nevertheless vital to safeguarding the land rights of the indigenous peoples of the Chittagong Hill Tracts, is the role of the traditional institutions — circle chief, *mauza* headman and village

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[16] "CHT land disputes: Commission chair takes flak about unilateral decision", *Daily Star*, Dhaka, 22 March 2010.

[17] See R. D. Roy, *The ILO Convention on Indigenous and Tribal Populations, 1957 (No 107) and the Laws of Bangladesh: A Comparative Review* (Geneva, ILO, 2009).

[18] "PM pledges full implementation of CHT accord", *Daily Star*, Dhaka, 7 July 2012.

[19] Jagaran Chakma, "Land dispute in CHT may not be resolved", *Independent*, Dhaka, 12 September 2013.

karbari (headman)[20] — in land management and the administration of justice. Although the State judiciary is responsible for dealing with major crimes and commercial civil matters, the functions of the traditional institutions related to the administration of justice, including on civil, customary and minor criminal matters, continue as before, albeit with reduced jurisdiction, in comparison to the period under British colonial rule (1860-1947).[21]

25. Section 8 (4) of the Chittagong Hill Tracts Regulation, 1900, as amended in 2008, declares that all civil cases must be tried in accordance with "existing laws, customs and usages", while barring the State courts from trying cases on "family laws and other customary laws of the tribes ... which shall be triable by the Mauza Headmen and Circle Chiefs". The judicial authority of the traditional institutions is also mentioned in several other statutes specific to the Chittagong Hill Tracts from the periods before and after the adoption of the Accord.[22] A number of rulings of the Supreme Court of Bangladesh have unequivocally declared that the customary personal laws of the Chittagong Hill Tracts tribes cannot be arbitrarily interfered with,[23] and that land administration and judicial officers must issue succession certificates in consultation with the circle chiefs and *mauza* headmen.[24] Although the validity of the Chittagong Hill Tracts Regulation was questioned in an earlier case before the Supreme Court, the ruling has been stayed, pending appeal.[25]

26. The land administration authority of the traditional institutions is based upon age-old laws, customs, usage and practices that predate the attachment of the Chittagong Hill Tracts to Bengal by the British colonial Government in 1860.[26] Customs and usages are included in the definition of law in article 152 (1) of the national Constitution and are also recognized, implicitly, by the Chittagong Hill Tracts Regulation, 1900.[27] The law of 2001 on the Land Commission reinforces the role of the traditional institutions by expressly recognizing the validity of customary law, and by including the circle chiefs as members of the Land Commission.

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[20] Circles and *mauza* are administrative units. For an explanation of the traditional administrative system of the Chittagong Hill Tracts, see www.mochta.gov bd/index.php/index/othercontent/Other-Details__14/11/0/12.

[21] "The system of traditional administration in the Chittagong Hill Tracts", in Sanjeeb Drong, ed., *Solidarity, 2013* (Dhaka, Bangladesh Indigenous Peoples Forum, 2013); Martin, Institutional Capacity Building; Van Schendel, *The Chittagong Hill Tracts: Living in a Borderland*.

[22] Section 8 and rule 40 of the Chittagong Hill Tract Regulation, 1900; section 66 of the Hill District Councils Act, 1989.

[23] *Aung Shwe Prue Chowdhury* v. *Kyaw Sain Prue Chowdhury and others*, *Dhaka Law Report*, vol. 50, 1998; *Rajkumari Unika Devi* v. *Bangladesh and others*, *Bangladesh Law Chronicles*, vol. 12, 2004.

[24] *Abrechai Magh* v. *Joint District Judge and others* (Writ Petition No. 3285 of 2009).

[25] *Rangamati Food Products* v. *Commissioner of Customs and others*, *Bangladesh Law Chronicles*, vol. 10, 2005.

[26] Qanungo, *Chakma Resistance to British Domination (1772-1798)*; Van Schendel, *The Chittagong Hill Tracts: Living in a Borderland*.

[27] Section 8 (4) and rules 34, 35, 38-41, 42, 45, 47, 48 and 50 (1).

IV. Best practices in respect of resolving land disputes and land claims in the Philippines

Indigenous peoples of the Philippines

27. The Philippines is another example of a country where indigenous peoples struggle for land rights and self-determination. It is an archipelago of approximately 7,100 islands. Updated and accurate estimates of the indigenous population are unavailable. However, in the 1995 census, the estimated indigenous population was about 12.8 million, comprising 17 per cent of the total population and representing 110 different ethnolinguistic groups. The majority of the indigenous population is distributed as follows: Mindanao, 61 per cent, Luzon, 36 per cent and the Visayas, 3 per cent.[28] The indigenous population is concentrated in five major areas: the Cordillera Administrative Region on Luzon island, where the indigenous peoples are collectively known as Igorots; on the island of Mindanao, now known as Bangsa Moro, where the indigenous peoples are called Lumads; on the island of Mindoro, inhibited mainly by the Mangyan people; and on the island of Palawan, which is traditionally inhabited by the Palawan community.

Struggle for self-determination and defence of the ancestral domains

28. Indigenous peoples of the Philippines have experienced a long history of discrimination by State authorities, leading to land alienation, involuntary resettlement and acute marginalization. As in the Chittagong Hill Tracts, they have been subjected to what has been termed "development aggression".[29] Mass mobilization in defence of their ancestral realm and land rights ensued, including in the Cordilleras, where the Chico Dam project forced the displacement of 100,000 people in the 1970s.

29. Since the 1930s, the Government of the Philippines has promoted mining, which reached its climax when the Mining Act of 1995 was passed. The Act provided sweeping authority to mining companies and facilitated financial and legal incentives for foreign investment. Consequently, mining operations continued unabated across the country, without any prior consultation, let alone consent, of the communities concerned. They covered approximately 850,000 ha of land, about 2.8 per cent of the total area of the country, a large part of which are the ancestral domains and lands of indigenous peoples.[30] The corporations were held responsible by the indigenous peoples for the destruction of their rich cultures, some elements of which are said to have been replaced by degenerated values and practices, such as alcohol abuse, gambling, and prostitution.[31]

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[28] J. Corpuz, "Legal pluralism: the Philippine experience", in M. Colchester and S. Chao, eds., *Divers Paths to Justice: Legal Pluralism and the Rights of Indigenous Peoples in Southeast Asia* (Chiangmai, Thailand, Forest Peoples Programme and Asia Indigenous Peoples Pact, 2011).

[29] C. Doyle and J. Gilbert, "Indigenous peoples and globalization: from 'development aggression' to 'self-determined development'", in *European Yearbook of Minority Issues*, vol. 8 (2009), edited by the European Centre for Minority Issues and the European Academy Bozen/Bolzano (2011).

[30] R. D. Rovillos, S. Ramo and C. Corpuz, Jr., "When the 'isles of gold' turn to isles of dissent: a case study on the Philippine Mining Act of 1995", Forest Peoples Programme, 2005.

[31] E. Caruso and others, eds., *Extracting Promises: Indigenous Peoples, Extractive Industries, and the World Bank*, 2nd edition (Baguio City, the Philippines, Tebtebba Foundation and Forest Peoples Programme, 2005).

Constitutional dispensations, the Indigenous Peoples' Rights Act of 1997 and the National Commission on Indigenous Peoples

30. The Philippines Constitution of 1987 for the first time expressly recognized the identity and rights of the indigenous peoples, who were called "indigenous cultural communities". It also provided for the formation of autonomous regions in the Cordilleras and in Muslim Mindanao (since renamed Bangsa Moro). In 1997, the same year as the Chittagong Hill Tracts Accord was signed and the Government of India concluded a ceasefire agreement with indigenous Naga fighters, the Indigenous Peoples' Rights Act was passed in the Philippines, leading to the establishment of the National Commission on Indigenous Peoples, which was mandated to protect and promote the well-being of the indigenous peoples. The passage of the Act was met with much jubilation in the Philippines, because of its protective measures on four "bundles" of rights: (a) ancestral domains and lands; (b) self-governance and empowerment; (c) social justice and human rights; and (d) cultural integrity.[32] In fact, the Philippines is among the few countries (Australia and the Plurinational State of Bolivia are the others) that have a written regulation on free, prior and informed consent that is recognized under national law.[33]

National Commission on Indigenous Peoples, free, prior and informed consent and implementation of the Indigenous Peoples' Rights Act

31. The National Commission on Indigenous Peoples Administrative Order of 1998, issued in accordance with the Indigenous Peoples' Rights Act, made it mandatory for free, prior and informed consent to be obtained from all members of an indigenous community for mining activities on its ancestral domains and lands.[34] Clear instructions were prescribed on the procedure for consultation and adherence to customary practices. This is in accordance with article 32 (2) of the Declaration, which states that the free, prior and informed consent process must be followed "for any project affecting [indigenous peoples'] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources". Despite these legal requirements, there are allegations that free, prior and informed consent has occasionally been reduced to a mere formality, with the consent-seeking process failing to be exhaustive,[35] and occasionally with consent being "engineered".[36] Unlike the case of the Chittagong Hill Tracts Land Commission, the commissioners of the National Commission on Indigenous Peoples are selected by the Office of the President, and there is no guarantee of direct and adequate indigenous representation, complicating the matter further.

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[32] Institute for Autonomy and Governance (IAG), The Struggle Continues: Uphold the Rights of Indigenous Peoples, IAG Policy Brief, April 2011.

[33] A. Buxton, "The spirit of FPIC: lessons from Canada and the Philippines", in International Institute for Environment and Development, *Biodiversity and Culture: Exploring Community Protocols, Rights and Consent* (London, 2012).

[34] W. N. Holden and A. Ingelson, "Disconnect between Philippine mining investment policy and indigenous peoples' rights", *Journal of Energy and Natural Resources Law*, vol. 25, No. 4 (November 2007).

[35] M. Salamat, "Indigenous peoples' groups decry use of IPRA and NCIP for development aggression", 12 August 2011.

[36] M. Colchester and M. F. Ferrari, Making FPIC Work: Challenges and Prospects for Indigenous Peoples (Forest Peoples Programme, 2007).

32. The overall situation improved after 1997, when the Indigenous Peoples' Rights Act was passed, but both legal and operational loopholes remain. Mining companies were seen to regard the law and related legal requirements on free, prior and informed consent as impediments. The constitutionality of the Act was challenged in the Supreme Court, with allegations that the authority of the State over natural resources had been compromised.[37] The judges had divided opinions, but ultimately, the law was upheld. In any case, it is said that such attempts to undermine the Act have led to the weakening of the Commission's stand on free, prior and informed consent, among other things. It is believed that the Commission's administrative guideline, Administrative Order No. 1998-3, was issued at the behest of mining lobbies. The Order states that mining companies that had received approval for mining activities before the Act came into effect would not be required to follow free, prior and informed consent procedures. Critics have therefore demanded that the Mining Code be scrapped and greater autonomy for the Commission, with decreased dependency on the national Government.

33. Issuing certificates of ancestral domain titles and certificates of ancestral land titles is foremost among the mandated functions of the Commission. By 2007, it had reportedly issued certificates of ancestral domain titles for about .95 million ha and certificates of ancestral land titles for a further 4,800 ha out of the 2.9 million ha for which claims had been registered.[38] The Commission has been criticized for its inability to exhaust all the claims for certificates of ancestral land titles and certificates of ancestral domain titles, and it has been alleged that it tends to spend more funds on administrative matters than on field-level activities. However, although its work may not have met the expectations of many, given the budgetary, logistical and manpower constraints that beset it, the Commission's achievements in providing certificates may be regarded as more than modest, if not remarkable.

34. In addition to issuing certificates of ancestral domain titles and certificates of ancestral land titles, there are two other important aspects of the Commission's work, namely: (a) to establish model ancestral domain communities through development and peace; and (b) to enforce human rights and facilitate empowerment of indigenous peoples, including through its quasi-judicial authority.[38] However, some of these functions, along with the titling process, involve undue procedural complexities, requiring documentary and other evidential support, which is a heavy burden for remote communities. In this respect, the Chittagong Hill Tracts system seems to be far more indigenous-friendly.

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[37] W. Holden, K. Nadeau and R. D. Jacobson, "Exemplifying accumulation by dispossession: mining and indigenous peoples in the Philippines", *Geografiska Annaler, Series B, Human Geography*, vol. 93, No. 2 (June 2011).

[38] M. Colchester and C. Fay, Land, Forest and People: Facing the Challenges in South-East Asia (Rights and Resources Initiative, 2007).

V. Comparing the indigenous land rights and land claims systems in the Philippines and in the Chittagong Hill Tracts, Bangladesh

35. The discussion in the preceding paragraphs shows that the respective systems concerning indigenous land rights in the Chittagong Hill Tracts and in the Philippines have several strongly positive features. The strengths in the Philippines include: (a) formal recognition of customary land rights and autonomy; (b) entrenchment in the Constitution; (c) grant of formalized titles; and (d) adherence to the principle of free, prior and informed consent. The weaknesses include: (a) inadequate indigenous participation at decision-making levels; (b) bureaucratic and procedural complexities; (c) insufficient adherence to the free, prior and informed consent process; and (d) funding and logistical shortages in the work of the National Commission on Indigenous Peoples.

36. In the system in the Chittagong Hill Tracts, some of the positive features present in the Philippines system are absent or inadequate, including constitutional recognition and free, prior and informed consent. In addition, non-implementation of crucial provisions of the 1997 Accord, including the amendment of laws concerning the Land Commission and devolution on matters concerning land management, has undermined an otherwise sound process of recognition of land claims and settlement of land disputes. Among the strongest features of the Chittagong Hill Tracts system is the generic and undefined recognition of customary land rights accorded by statutes, coupled with the role of traditional and other Chittagong Hill Tracts-based institutions in self-government and land administration. The consent of those institutions is required for all land titling and land transfer cases and, since 1998, also in the case of compulsory acquisition by the State. Additionally, the institutions specific to the Chittagong Hill Tracts may autonomously formalize rights on customarily used commons and homestead plots.[39] Such a system has been described by this author elsewhere as a "shield" for indigenous land rights, if not a "sword".[40] The system also makes the generally asymmetrical relationships between customary law on the one hand and statutes on the other, and between indigenous authorities on the one hand and State officials on the other, more equitable, enabling the indigenous leaders to make the playing field a little more level.[41]

37. Tables 1 and 2 below set out in brief the relative major strengths and weaknesses of the systems in the Philippines and the Chittagong Hill Tracts with regard to land claims and land disputes concerning indigenous peoples.

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[39] Section 8 and rules 39-42, 45 and 50 of the Chittagong Hill Tracts Regulation, 1900 and section 64 of the Hill District Councils Act, 1989.

[40] R. D. Roy, "Indigenous peoples and international human rights — plural approaches to securing customary rights", in S. Chao and M. Colchester, eds., Human Rights and Agribusiness: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform (Moreton-in-March, United Kingdom, Forest Peoples Programme, 2012).

[41] R. D. Roy, "Asserting customary land rights in the Chittagong Hill Tracts, Bangladesh: Challenges for Legal and Juridical Pluralism" in Colchester and Chao.

Table 1
Major strengths and weaknesses of the land-related systems concerning indigenous peoples in the Philippines

Strengths	*Weaknesses*
Customary land rights and autonomy recognized in statutes	Inadequate indigenous participation in decision-making, including administration of justice and regional autonomy
Constitutional entrenchment of land rights regime and autonomy	Funding, logistical and manpower shortages in the National Commission on Indigenous Peoples
Grant of formalized titles	Bureaucratic and procedural complexities in land-titling process causing evidential burden
Free, prior and informed consent process generally followed	Free, prior and informed consent process inadequately followed

Table 2
Major strengths and weaknesses of the land-related systems concerning indigenous peoples in the Chittagong Hill Tracts, Bangladesh

Strengths	*Weaknesses*
Indigenous participation in decision-making (ministry, councils, Land Commission, traditional chiefs)	Self-government and land management system not constitutionally entrenched
Traditional indigenous justice system recognized	Indigenous land grant and traditional systems for the administration of justice have insufficient State support in enforcement
Generic recognition of customary law	Free, prior and informed consent not formally acknowledged

38. The following paragraphs compare the land claims and land dispute resolution systems in the Chittagong Hill Tracts and the Philippines with the provisions of the Declaration.

39. Combined, the indigenous land claims and land dispute resolution systems in the Philippines and the Chittagong Hill Tracts contain a number of features that are absent elsewhere. The two systems have the potential to effectively protect and safeguard indigenous peoples' land rights, including through a formal or quasi-formal system of recognition by the State, and through a judicial or quasi-judicial process of resolution of land disputes. They are therefore worthy of replication in other countries, with modification as appropriate. Together, the two systems contain the following important features: (a) formal recognition of customary land rights; (b) safeguards against land alienation; (c) redress mechanisms to address land disputes while accounting for customary law; and (d) inclusion of indigenous peoples in major decision-making processes. Table 3

below sets out these features with reference to specific provisions of the Declaration.

Table 3
Major features of the land-related systems concerning indigenous peoples in the Philippines and the Chittagong Hill Tracts, Bangladesh with reference to specific provisions of the Declaration

Subject matter/article of the Declaration	*Philippines system*	*Chittagong Hill Tracts system*
Self-determination and autonomy (art. 3)	Constitutional provision on regional autonomy	Ministry of Chittagong Hill Tracts Affairs, Chittagong Hill Tracts councils and traditional institutions
Retention of indigenous institutions (arts. 5, 34)	Ancestral domain communities	Traditions institutions of chief, headman and *karbari*
Participation in decision-making affecting indigenous peoples (art. 18)	Constitutional provision on regional autonomy	Indigenous representation at the Ministry, councils and the Land Commission, and in land administration and the administration of justice
Right to be consulted on legislation concerning indigenous peoples (art. 19)	–	Prerogatives of Chittagong Hill Tracts Regional Council and Hill District Councils in legislation concerning indigenous peoples and respective territorial jurisdictions
Recognition of customary law and fair adjudication on indigenous peoples' land rights (arts. 27, 28 and 40)	Constitutional law, Indigenous Peoples Rights Act, role of National Commission on Indigenous Peoples (including certificates of ancestral domain titles and certificates of ancestral land titles) and provisions on regional autonomy	Constitutional and other statutory recognition of customary law and judicial pronouncements, and the role of institutions specific to the Chittagong Hill Tracts in land management, the Land Commission and traditional courts

Lessons from other jurisdictions in Asia for land claims and land dispute resolution

40. In addition to the systems in the Philippines and the Chittagong Hill Tracts mentioned above, there are other sound examples, in Asia and elsewhere, of formal recognition of indigenous land and resource rights and indigenous participation in legislation and policymaking, land management, land administration and the administration of justice. Foremost among them are those in several states in north-eastern India, and in the States of Sabah and Sarawak, Malaysia. These systems are also models that are worthy of replication elsewhere. Some of the most important features of these systems are shown in table 4 below, in brief form. Tables 3 and 4 may be compared to obtain an overview of the land-related systems in the four jurisdictions mentioned above.

Table 4
Major features of the land-related systems concerning indigenous peoples in north-eastern India, and Sabah and Sarawak, Malaysia with reference to specific provisions of the Declaration

Subject matter article of the Declaration	*North-eastern India*	*Sabah and Sarawak, Malaysia*
Self-determination and autonomy (art. 3)	Special safeguards concerning the States of Nagaland and Mizoram (Constitution of India, arts. 371A and 371G, respectively) Autonomous district and regional councils (Constitution of India, Sixth Schedule, art. 164 (1))	Special safeguards concerning the constitutional status of the States of Sabah and Sarawak and of their natives (Constitution of Malaysia, arts. 161E and 161A, respectively)
Retention of indigenous institutions (arts. 5 and 34)	Appointments of chiefs and headmen by district councils (Constitution of India, Sixth Schedule)	Role of traditional chiefs and headmen in land management and the administration of justice (Constitution of Malaysia, Ninth Schedule, clause 13, list IIA; clause 10, list IIIA)
Participation in decision-making affecting indigenous peoples (art. 18)	Reservation in legislative bodies and government posts (Constitution of India, arts. 330 and 332 and 16 (4A), respectively) Autonomous District and regional councils (Constitution of India, Sixth Schedule)	Special legislative provisions safeguarding the rights of Sabah and Sarawak in policymaking on land (Constitution of Malaysia, arts. 95D and 95E) Role of native courts (Native Courts Enactment, 1952)
Right of consultation on legislation concerning indigenous peoples (art. 19)	Special safeguards for Nagaland and Mizoram States (Constitution of India, arts. 371A and 371G, respectively) Legislative prerogatives of Autonomous District and regional councils (Constitution of India, Sixth Schedule)	Special legislative provisions for Sabah and Sarawak (Constitution of Malaysia, arts. 95D, 95E, 161E (4))
Redress for land rights and land claims (arts. 27, 28 and 40)	Legislative and executive role of state governments Specialized traditional courts in several states Land administration and role of Autonomous District and regional councils in the administration of justice (See constitutional dispensations mentioned above)	High Court of Sabah and Sarawak Role of Native Court of Appeal, Native District Court and courts of native chiefs and headmen Special legislative prerogatives of the States of Sabah and Sarawak (See legal dispensations and institutional processes mentioned above)

VI. Conclusion and recommendations

A. Conclusion

41. The systems in the Philippines and the Chittagong Hill Tracts, Bangladesh discussed above offer effective, or at least potentially effective, systems of land claims and land dispute resolution concerning indigenous peoples, although both have certain shortcomings that need to be addressed. Nevertheless, this study posits that those systems are models that are actually being implemented on the ground; they are not theoretical models devoid of operational realities. The same is the case for the systems in north-eastern India and in the States of Sabah and Sarawak, Malaysia. Detailed studies on these systems can offer practical ideas for implementation elsewhere. Prompt acknowledgment of indigenous land claims and resolution of land disputes will in the long run curtail governmental expenditure and efforts, lead to sustainable peace, improve relations between indigenous peoples and the State, and facilitate inclusive, people-oriented, environmentally sound and culturally sensitive development, with the free, prior and informed consent of the peoples and communities concerned.

B. Recommendations

42. The following recommendations are offered to Governments, the United Nations system, multilateral and bilateral development agencies and financial institutions, research institutions, non-governmental organizations (NGOs), the private sector and indigenous peoples.

Governments

43. The Government of Bangladesh is urged to carry out its pledges, and its political and legal responsibilities, to amend the Chittagong Hill Tracts Land Commission Act, 2001, in accordance with the recommendations of the Chittagong Hill Tracts Regional Council.

44. The Government of Bangladesh is urged to implement the unimplemented provisions of the Chittagong Hill Tracts Accord of 1997, as highlighted in the report of the Permanent Forum on its tenth session (see E/2011/43 and Corr.1, paras. 102-103), including the transfer of full authority for land administration to the Hill District councils, to rehabilitate the unrehabilitated Jumma refugees and the internally displaced indigenous people, and to effectively demilitarize the Chittagong Hill Tracts.

45. The Government of the Philippines is urged to take steps to resolve the legal, procedural, logistical and financial shortcomings faced by the National Commission on Indigenous Peoples, including in the Commission's work on providing certificates of title to ancestral domains and certificates of title to ancestral lands. It should facilitate the autonomous functioning of the Commission, free from adverse political or corporate influences. The exemptions from free, prior and informed consent on mining concessions granted prior to the adoption of the Indigenous Peoples Rights Act need to be revoked.

46. The Government of the Philippines is urged to facilitate the strengthening of local government bodies in regions and areas inhabited by indigenous peoples,

including by framing and implementing organic acts on regional autonomy in the Cordilleras, in partnership with, and with the free, prior and informed consent of, the indigenous peoples concerned.

47. The National Commission on Indigenous Peoples is urged to ensure that the free, prior and informed consent process is scrupulously followed, in accordance with the Indigenous Peoples Rights Act and the customary laws concerned, in granting certificates of title to ancestral domains and certificates of title to ancestral lands and to enhance indigenous participation in all relevant activities and at all levels. It should revise procedural practices that cause an undue evidential burden on communities, including supporting documents, to establish their claims.

48. Governments in Asia and elsewhere are urged to study the land claims and land dispute resolution systems in the Chittagong Hill Tracts, Bangladesh and the Philippines, among others, and to obtain implementable ideas on these matters that are relevant to their situations.

Agencies, funds and programmes of the United Nations system

49. Relevant agencies, funds and programmes, including the World Food Programme, the Food and Agriculture Organization of the United Nations, the International Fund for Agricultural Development, the United Nations Development Programme, the United Nations Entity for Gender Equality and the Empowerment of Women and the World Bank, should recognize the importance of the prompt, fair and inclusive resolution of land claims and land disputes involving indigenous peoples and take account of existing good practices, including those referred to in this study, in their policies, operational guidelines, activities and practices.

Bilateral development institutions, multilateral development banks and other international financial institutions

50. Bilateral development agencies should take account of the best practices offered in this study, along with other relevant experiences, to facilitate fair resolution of indigenous land claims and land disputes through projects and programmes funded by them.

51. Multilateral financial institutions, including the International Finance Corporation, and multilateral development institutions, such as the regional development banks, including the Asian Development Bank, should ensure that projects and programmes financed by them facilitate fair resolution of indigenous land claims and land disputes, and prevent and avoid adverse impacts on indigenous land rights.

52. The World Bank is particularly urged to amend its indigenous peoples policy to include full compliance with the Declaration, with particular importance given to the adoption of the standard of free, prior and informed consent.

Universities and other research institutions

53. Universities and other research institutions are urged, in partnership with indigenous peoples, to conduct in-depth research on the systems referred to in this study, to assist Governments, indigenous peoples, the United Nations system and other relevant actors to promote the relevant models concerning indigenous land claims and land dispute resolution.

54. NGOs are encouraged, in partnership with indigenous peoples, to undertake research on the models referred to in this study; facilitate indigenous peoples' efforts in this regard, such as advocacy and lobbying; and promote best practices and other relevant models on indigenous land claims and land disputes, including in their programmes and projects.

Indigenous peoples

55. Indigenous peoples, their Governments, and other institutions, organizations and networks are urged to study the models referred to in this study, along with other relevant models, to facilitate mobilization, lobbying and advocacy, dialogues with States, further research and other relevant activities in connection with advancing indigenous rights related to land, territory and resources, including recognizing land claims and promptly resolving land disputes involving indigenous peoples.

Private sector

56. Private sector entities, including corporations, banks and other financial institutions, are urged to avoid activities that violate indigenous peoples' land rights and to promote and protect indigenous land claims and the resolution of land disputes.

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Item 7 of the provisional agenda*
Ongoing priorities and themes and follow-up

Report on the living conditions of indigenous children and adolescents in Mesoamerica and compliance with their rights

Note by the Secretariat

In accordance with the decision taken by the Permanent Forum on Indigenous Issues at its tenth session (see E/2011/43, paragraph 77), the Forum decided to appoint Álvaro Pop and Myrna Cunningham to prepare a report on the situation of indigenous children in Latin America and the Caribbean. [1]

* E/C.19/2014/1.

[1] Subsequently, the Forum members decided to prepare a report on the living conditions of indigenous children and adolescents in Mesoamerica and compliance with their rights. The Forum members would like to thank Zully Morales for her support in the preparation of the report.

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Report on the living conditions of indigenous children and adolescents in Mesoamerica and compliance with their rights

I. Presentation

1. The main findings of the independent expert Álvaro Pop in relation to the living conditions of indigenous children and adolescents in Mesoamerica and compliance with their rights are summarized below.

2. One of the findings is a factor that is common to all countries: in addition to lagging behind all other groups in terms of social development indicators, the indigenous population receives the smallest share of public expenditure in each country where a specific budget line exists. In Mexico, for example, the general indigenous population receives 9.34 per cent of all public expenditure. Strictly speaking, it could be argued that this figure is too low, because it refers to a direct allocation. Guatemala, in contrast, has a food aid programme to reduce the chronic malnutrition rate, but no record of how much of that aid, entitled *Mi Bolsa Segura* by the current Government (2012-2015), is specifically targeted at indigenous children.

II. Similar issues and situations

3. Since Mesoamerican countries share a history of colonization and nation-building, they also have similar social conditions. The vast majority of the indigenous population, for example, lives in rural areas because in colonial times the urban areas developed around the colonizers' settlements. It is worth noting that most of these populations were displaced from their original lands and resettled to suit the colonizers' interests.

4. In general, the fact that indigenous groups gathered together in rural communities made their culture more resilient to external influences but left them at a great disadvantage compared to the rest of the population, because urban areas have without exception become the development hubs in the countries studied.

5. Another shared historical feature is the seasonal migratory flows that occur within countries and, in the case of Guatemala, from the west of the country to the south of Mexico during the coffee harvest. In these situations the whole family travels, and children and adolescents do not receive direct payment because their work is usually considered as part of the father's work.

6. Another shared factor is that the lack of opportunities for work and study in the countries of origin, particularly in rural areas, means that children and young people are victims of family disintegration when one or both parents migrate to the United States (this phenomenon occurs in both Nicaragua and Costa Rica) in search of better incomes to give their family a higher standard of living. In such cases, children stay with their mother, grandparents or aunts and uncles, which leaves them vulnerable to greater discrimination and abuse of all kinds and at risk of violence.

7. In other cases, which go largely unrecorded by States, children and adolescents migrate to the United States in order to contribute to the household economy and ensure that their parents and siblings have better opportunities. In addition to

leaving the family, they also have to face a series of dangers ranging from violence to loss of life on their way to the United States, and have no support and no protection of their rights either on the journey or in the destination country.

8. One of the consequences of migration, in particular migration to the United States, is the loss of national and ethnic identity, a phenomenon that has to be addressed because it violates the rights of children and adolescents in every sense.

9. Migrants are searching for better opportunities, but their economic and social rights are infringed without anyone paying attention; in addition to the violation of individual rights, the serious violation of collective rights is also ignored.

10. Furthermore, according to the State of the Region report on sustainable human development published in 2011 by the State of the Nation Programme of Costa Rica, Central America, in particular Guatemala and Honduras (together with El Salvador and Belize), is the most violent region of Latin America; the number women murdered has increased and, worryingly, most of these killed (both men and women) are aged between 18 and 34. It should also be noted that a number of vicious murders of girls have been committed in Guatemala. It has also been confirmed that organized criminal groups and gangs are involving and using children and adolescents in various criminal activities, including contract killings, because the law does not punish children and adolescents as harshly as adults. This phenomenon occurs mainly in the capital and in major urban centres.

11. Drug traffickers also use children to sell drugs and often pay them in drugs instead of money, thus making them addicts at an early age and keeping them tied to trafficking networks.

12. Nonetheless, both Mexico and the Central American countries studied have ratified international instruments on human rights, specifically the rights of the child and of indigenous peoples, and have produced ordinary legislation in those areas. In view of the situation of indigenous children and adolescents in those countries, however, the expected benefits of this legal framework would not yet appear to have reached indigenous communities or the population as a whole. We must therefore seek to establish the reasons why this legislation is not being applied and the rights of this population are being repeatedly violated from various quarters.

III. The situation of indigenous children and adolescents in Mexico

13. Mexico has a total population of over 110 million. According to official figures, the indigenous population makes up 10 per cent of that total.

14. Although the various Mexican indigenous peoples can be found throughout the national territory, this study begins with an examination of the issues at the national level and then focuses on the three southern States of Chiapas, Campeche, and Tabasco.

15. It is clear that indigenous children and youth are provided with fewer educational, economic and health-care opportunities than the non-indigenous population, both by the State and their families. As their parents had even less opportunities, indigenous children and youth find themselves ensnared in the same patterns of exclusion that eventually lead to poverty.

16. The national budget of each country reflects glaring inequalities in the public spending that benefits indigenous persons with the greatest need. The 10 per cent with the lowest human development index (HDI) receive only 5.7 per cent of the total public expenditure on education intended for that group. Similarly, the same group receives only 6.7 per cent of Government transfers to indigenous persons, while the 10 per cent of the indigenous population with the highest HDI receives 31.7 per cent. On the whole, according to the 2010 Human Development Report on Indigenous Peoples in Mexico prepared by the United Nations Development Programme (UNDP) the general indigenous population received 9.34 per cent of total federal Government spending in 2008, meaning that the non-indigenous population received about 90.7 per cent of this spending.

17. Although targeted federal spending includes a compensation scheme for the disadvantaged indigenous population, it does not guarantee increased opportunities. It is critical to generate sources of information that can more accurately assess whether the indigenous population actually benefits from the funds allocated to it.

18. There are contextual factors, such as health conditions, parents' aspirations and household socioeconomic status, that strongly influence the decision to attend school and have a direct bearing on progress in this component of development. School attendance rates among the indigenous population are lower than those of the non-indigenous population, and the difference between the rates increases after the age of 12. This indicates that indigenous youth begin to leave school after completing the primary level of education.

19. The failure to promote policies that guarantee a quality education for the different sectors of the population results in great social and economic costs. The direct consequence of an unfavourable learning environment, such as that in Mexico, and for the indigenous population in particular, is the intergenerational transmission of poverty and inequality.

20. There has been considerable progress towards achieving the Millennium Development Goals, and with respect to education in all three States surveyed, the governments are working to promote universal access to education and are devising programmes, projects and measures to reach different sectors of the population. However, government information and priorities rarely focus on indigenous peoples and specific groups such as children and adolescents.

21. Although gender equality is encouraged in the three States, there are no clear indicators of the impact on indigenous children and adolescents. As references to indigenous people are made in general terms, it is not possible to identify institutions providing bilingual education or specific, quantifiable actions taken by the State.

22. About 50 per cent of indigenous households without health insurance spend 30 per cent of their quarterly income on healthcare costs, which is twice the amount spent by non-indigenous households. This reduces the amount of income available for other necessities such as food, education or household goods, further decreasing the level of well-being.

23. In relation to employment, 45.9 per cent of indigenous men and 18.2 per cent of indigenous women work in the agricultural sector. The lack of education and training in other activities limits the opportunities available to the indigenous population to access high productivity employment and better working conditions.

24. The available data on education and health is too broad. For example, according to UNDP, there was a nationwide increase in the number of persons enrolled in school during the period 2000-2005, resulting in a slight increase in literacy levels among indigenous persons aged 15 years and older from 72.6 per cent to 74.3 per cent. As the data sources are not uniform, it is not possible to create profiles for southern Mexico, and even less so for each State and indigenous community with an indication of their specific circumstances.

IV. The situation of indigenous children and adolescents in Guatemala

25. Guatemala is a smaller country than Mexico and has fewer indigenous peoples (22 peoples of Mayan origin together with the Xinka and Garifuna make a total of 24), but official data indicate that 14 per cent of the population is indigenous, while other sources state that the indigenous population accounts for over 40 per cent of the total.

26. According to the 2011 National Survey of Living Conditions conducted by the National Institute of Statistics, Guatemala is a young country with 52 per cent of the population under the age of 20 years. According to the same survey, the majority of the youth population is located in the departments of Altiplano and Alta Verapaz, which also have the largest indigenous populations.

27. With regard to the national budget, direct spending on children and adolescents is still primarily handled by the Ministry of Education, which administers 90.6 per cent of the total. It is followed, in order of importance, by the Ministry of Public Health and Social Welfare with 4.8 per cent, while the secretariats and other offices of the executive branch administer the remaining 4.6 per cent earmarked for children. The Ministry of Social Development also has a substantial allocation, as does the Secretariat for Food Security. However, these offices do not provide a breakdown of investment; there is no data, for example, on the food aid programme, which is known by the current Government as *Mi Bolsa Segura*, or on the services for children with symptoms of chronic malnutrition to indicate how many children are indigenous or to which indigenous peoples they belong.

28. The national rate of chronic malnutrition is alarming, and has been on the political agenda (or at least part of the political discourse) of recent Governments. To address this situation, the current Government has given priority to 166 municipalities as part of the Zero Hunger Plan. However, almost one year later and despite a budget of over 5 billion quetzals, there has been little progress.

29. The Ministry of Education, through the General Directorate of Intercultural Bilingual Education, which reports to the Vice-Ministry of Intercultural Bilingual Education, keeps records of the number of children enrolling in school each year. Starting from the primary level, that number can then be compared with the number of children that pass into the next grade level. For example, according to these records, a total of 455,275 children enrolled in pre-primary education, including 268,105 from rural areas, 76,324 of whom were indigenous children.

30. In contrast, 355,785 students were enrolled in secondary school in 2011. Only 16.76 per cent of them were indigenous students and the percentage of indigenous students from urban areas far exceeded the 20.09 per cent of such students from

rural areas that had enrolled that year. A mere 9.65 per cent of the national total of 59,637 indigenous students were women from rural areas.

31. According to the preceding paragraphs, the higher the grade level, the fewer the number of students from rural areas, and the smaller the percentage of indigenous students. And there are even fewer female students, especially female indigenous students. The education system in Guatemala thus apparently favours or facilitates the education of the non-indigenous population and of those living in urban areas. It therefore follows that the current system is an exclusive one through which Guatemala condemns the rural and indigenous population to fewer job opportunities and to a future of little opportunity, while also perpetuating this system of inequality. Unless strong, decisive action is taken to change this situation, these trends will continue for a long time to come.

32. Concerning Guatemala's progress towards achieving the health-related Millennium Development Goals, it has met the target of reducing infant mortality (children under one year), is close to meeting the target for child mortality in children under age 5, but will be unable to meet the target for maternal mortality. With regard to the first indicator, the number of deaths per 1,000 live births decreased from 73 to 38 between 1987 and 2002. According to the American National Standards Institute (ANSI), the infant mortality rate was 42 deaths per 1,000 live births for the period of 2008/2009. The goal is to bring that number down to 37 by 2015.

33. On the subject of labour, the National Employment and Income Survey of 2011 reveals that the national average wage is 9 per cent less than the statutory minimum wage, and that in the private sector it is 8 per cent less. Average wages in the public sector are 59 per cent higher than the minimum wage. The salaries of the indigenous population, youth and women are, on average, 22 per cent less than the national average. Indigenous persons receive the lowest salaries in all fields.

34. According to the United Nations Children's Fund (UNICEF), there are 291,467 children aged between 10 and 15 years participating in the labour market. Two thirds are agricultural workers and are indigenous, and girls account for 26 per cent of that number. Their average salary is some 22 per cent of the minimum wage and is lower in trade and industry.

V. The situation of indigenous children and youth in Honduras

35. The purpose of this report is to describe the current demographic, economic and citizen security situation, in addition to health, education and employment in Honduras, from the perspective of respect for the rights of indigenous and Afro-descendant children and youth, to provide an assessment of the situation in those areas.

36. The population of Honduras was estimated at 8.2 million people in 2012, according to projections from the National Statistical Institute. The average age of Hondurans is 21 and indigenous people make up a minority of the population, 7.2 per cent of the total. The most recent data for children and youth are from 2007, when there were 2.08 million children and 3.44 million adolescents.

37. The gross domestic product (GDP) of Honduras was $15.347 billion in 2010; the per capita GDP for the same period was $2,016. That same year GDP grew by

2.8 per cent, less than in the period from 2001 to 2009, when the average growth rate was 4.1 per cent. The inflation rate in 2010 was 6.5 per cent, and the average rate for the decade was 7.5 per cent. Despite the performance of these indicators, the majority of the population has not felt the economic growth of recent years and 66.2 per cent of inhabitants live below the poverty line, with the rural population most affected by widespread poverty.

38. The general macroeconomic stability of the Honduran economy does not produce sufficient incentives to generate and attract investment in the country, which is reflected in the inadequate industrial and social infrastructure, poor job creation and low levels of productive enterprises. Among indigenous populations, the creation of and access to economic opportunities are even more limited.

39. In addition, Honduras has the worst levels of crime in Central America: its homicide rate is among the highest in Latin America; the most recent reported rate (2009) was 66.8 per 100,000 inhabitants. The high levels of crime and violence in Honduras pose an obstacle to both domestic and foreign investment, leading to unemployment. Those killed by the violence leave behind them orphans and widows and national talent is lost.

40. In terms of the national budget, no information has been found on specific budgetary line items for the indigenous population. As investment appears to benefit the entire population, it is easy to mistakenly believe that the State treats everyone equally, when in reality the indigenous population is at an enormous disadvantage.

41. In the area of education, curricula and teaching methods are often culturally inappropriate and indigenous girls and boys have no knowledge of the language of instruction. This leads to educational exclusion and hinders progress. According to research carried out by UNICEF, "it normally takes non-native speakers until the third grade before they can begin to truly understand what they are being taught on a relatively equal basis with their native speaking peers".

42. Regarding legislation in the area of education, Honduras has adopted certain rules and regulations to promote and protect access to universal education for indigenous and Afro-descendant populations. However, despite these efforts, the goals of the State initiatives have not been achieved.

43. As for Government health sector expenditure, in 2010 this accounted for 6.25 per cent of GDP in Honduras. The ratio of medical coverage was 870 inhabitants per doctor. With regard to causes of death among the indigenous and Afro-descendant child population of Honduras in 2011, health centres list preventable and treatable diseases which include pneumonia, parasitic conditions and malnutrition. In addition, the chronic malnutrition rate among children under five years of age was 11 per cent in 2010. About 66.1 per cent of Hondurans do not have adequate basic sanitation.

44. There are no health policies with mechanisms to prevent the main causes of mortality in the regions where indigenous children and youth live (malaria in coastal tropical forests and other low-lying areas and HIV/AIDS in areas visited by tourists). Also, the decline in the use of traditional medicine, which in the past met local needs for medical care, has worsened the situation of health coverage in their communities.

45. In recent years, public education has been assigned an average of 5.4 per cent of GDP. As for national coverage in education, 43.5 per cent of adolescents in

Honduras attended school in 2011, which is a gross violation of the right to education. Of these, 34.3 per cent were indigenous and Afro-descendant youth (aged between 13 and 17 years). The rates for educational access in Honduras among the urban and rural populations were 38.4 per cent and 11.4 per cent respectively, also in 2011. Of those, 89.4 per cent were children and 24 per cent were adolescents.

46. On the subject of child labour in Honduras, out of the total of 2,860,792 children between the ages of 5 and 18, 14 per cent were working in 2007 (only working or working and studying): 74 per cent were male and 26 per cent were female, with most child labour taking place in rural areas. The total of 400,069 working minors included 70 per cent in rural areas and the remaining 30 per cent in urban areas.

47. With regard to legislation, Honduras has ratified various treaties and conventions that protect the individual rights of indigenous children and adolescents: the conventions of the International Labour Organization (ILO) and the Convention on the Rights of the Child, and has supported, inter alia, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. However, those instruments have yet to be applied effectively and indigenous children and youth are still at a disadvantage compared to the rest of the population. In other words, without the political will to back application of the full range of international instruments or domestic legislation, in the form of adequately financed policies and programmes, the adoption of legislation in itself does not change the living conditions of this population.

48. According to the indicators analysed, indigenous and Afro-descendant children and youth (adolescents) are in the main the ones who suffer the worst levels of poverty in Honduras, owing to disadvantages in access to education and health care and the need to join the economically active population at a very early age. The existence of a legal framework to protect their rights is meaningless for a population that may even be unaware of all those instruments, and is even less likely to demand respect for those rights.

VI. The situation of indigenous children and adolescents in Nicaragua

49. The present report on Nicaragua is intended to portray the situation of the country in terms of demographics, the economy, citizen security and food and nutrition security, as well as health care, education and the labour market, with a view to guaranteeing the rights of indigenous children and youth, and thereby evaluating the situation of Nicaragua and Mesoamerica in general with regard to the aforementioned subjects.

50. The limited availability of data and statistical information on the above topics has greatly hampered the compilation of the documentary information in the present report. Much information has nevertheless been gathered, in particular on economic and social issues.

51. The majority of the Nicaraguan population lives near the Pacific coast, the area where most industries and services are found; the north is mostly agricultural and indigenous peoples are found mainly along the Atlantic coast, where the autonomous regions are located. According to the National Development Information Institute, the estimated population in 2012 was 6,071,045. Nicaragua

has the youngest population in Latin America: 37 per cent of Nicaraguans are under 14 years of age and 53 per cent of the population is under 18. The average age of Nicaraguans is 22.9 years. It is important to note that the indigenous population of Nicaragua is a minority accounting for 14 per cent of the total population. The population distribution by area of residence shows that 56 per cent of the people live in urban areas and 44 per cent in rural areas.

52. The GDP of Nicaragua was $6.551 billion in 2010. The GDP per capita in the same year was 1,127 dollars. GDP grew 4.5 per cent in 2010 compared to 2009. The year-on-year inflation rate was 9.2 per cent compared to 2009.

53. Despite economic growth in recent years, poverty affects 48.3 per cent of the population, of which 17.3 per cent lives in extreme poverty. Rural poverty is more widespread and severe than urban poverty. Poverty affects 30.9 per cent of the urban and 70.3 per cent of the rural population, while the level of extreme poverty is 6.7 per cent in urban and 30.5 per cent in rural areas.

54. Work in the field of citizen security is focused on three main areas, namely, organized crime, drug trafficking and gangs, but also on corruption and a lack of transparency in institutions. Other factors closely linked to security issues are increased migration, youth unemployment, a lack of access to education, poor housing, violence against children and domestic violence.

55. The Supreme Court of Justice has stated that citizen security is one of its greatest concerns, since it is not only a matter of the population's perception but also of foreign investor confidence in Nicaragua.

56. No information is available on direct allocations for health care, education, nutrition and other areas affecting indigenous children and adolescents in the national budget, apart from general allocations targeted at the entire population, despite decentralization and the existence and recognition of the autonomous regions.

57. Although there have been significant improvements in food and nutrition security, 22 per cent of the population still suffers from chronic malnutrition. The efforts of the Government of Nicaragua include the Zero Hunger programme and the Food and Nutritional Security and Sovereignty Act. However, there are still serious shortcomings with regard to the right to food.

58. Total public expenditure on education increased from 3.1 per cent of GDP in 1994 to 5.0 per cent in 2007. This improvement is not reflected in ethnic communities, in which one of the main problems is illiteracy, given that 30 per cent of the population cannot read or write. This situation creates serious difficulties for these groups in accessing employment opportunities and leads to unemployment, underemployment (employment in the informal sector), low earnings and limited social security coverage.

59. The illiteracy rate in Nicaragua is 7.5 per cent (among persons aged 15 years and over). The net enrolment rate is 91.8 per cent at the primary level and 45.2 per cent at the secondary level, whereas at the intermediate level it is 18.0 per cent. The net school enrolment rate has remained at 46 per cent, while the school retention rate is 90.9 per cent. In addition, the repetition rate at the primary level is close to 11.0 per cent, while at the secondary level it is 7.9 per cent. The Miskito and mixed-race groups of the Caribbean coast and the Chorotega-Nahua-Mange people total 238,000 inhabitants, representing 65 per cent of the total indigenous population.

Among these peoples, illiteracy ranges from 28.7 per cent in the case of the Miskito to 37.6 per cent for the mixed-race inhabitants of the Caribbean coast. The community with the lowest illiteracy rate is the Creole community, with 8.1 per cent, but it makes up only 4.9 per cent of the total indigenous population. Indigenous peoples have benefited the least from educational opportunities owing to problems of coverage due to geographical isolation, the prevalence of low living standards and extreme poverty, which hinder their integration into the education system.

60. Although spending on health care amounted to about 4.2 per cent of GDP in 2010 and shows signs of increasing, the indigenous peoples of the north, the centre and the Pacific coast of Nicaragua (Chorotega, Xiu and Nahoas) report a large number of sick people in their communities. In general, in Nicaragua, the availability of drinking water and sanitation is very low, especially in rural areas and the thinly populated Atlantic autonomous regions.

61. The infant mortality rate is close to 21.5 per 1,000 live births, whereas the mortality rate for children under five is close to 26 per 1,000, and the maternal mortality rate is 100 per 100,000 births. There are 0.9 hospital beds per 1,000 inhabitants and a total of 3,779 doctors to meet the country's needs. Meanwhile, the proportion of births attended by trained personnel is only 74 per cent.

62. The Nicaraguan national sexually transmitted disease/HIV/AIDS programme began with the inclusion of AIDS in 1987, at the time the first case was reported in the country. Government sources report that, as at the end of June 2000, 559 people living with HIV had received treatment; of that number, 254 (45 per cent) had entered the AIDS stage, and 143 (53 per cent) were reported to have died. In Nicaragua there is a high prevalence rate: 11 out of every 100,000 inhabitants are living with the virus.

63. In Nicaragua, 7,000 street children reportedly use inhalants. A recent study at a market in Managua found that 1,300 children were using such substances. Drugs used by street children include not just glue but also crack, consumption of which is rising.

64. Employment for the indigenous peoples of Nicaragua is characterized by low incomes, unemployment and underemployment owing to their low level of education and vocational training and their forced entry into the labour market as dependent wage earners or small farmers. The social exclusion faced by the indigenous peoples of Nicaragua limits their chances of finding decent work, and should be considered in the specific context of the violation of the collective rights of indigenous peoples, especially land rights. In most cases, work for indigenous Nicaraguans means subsistence production, not a source of income or paid work.

65. According to ILO, 45 per cent of the population of the autonomous regions along the Caribbean coast is dependent on agricultural activities; 22.3 per cent earn their income in the service sector; 12.5 per cent and 11.7 per cent work in fisheries and commerce, respectively, and the remaining 8.5 per cent are classified as having other activities.

66. Nicaragua has a legal framework that protects the rights of children and adolescents and prohibits child labour. However, most children and adolescents work in the informal sector of the economy and are therefore prevented from attending school. According to a national child labour survey carried out by the Ministry of Labour in 2006, more than 265,881 children and adolescents aged from 15 to 17 were active workers, representing 13.4 per cent of the population in that category.

67. The Government of Nicaragua recognizes that one of the obstacles to guaranteeing the exercise of the rights of children and young people is that the indigenous population, as a minority, has historically been marginalized. Although training and awareness-raising efforts have been directed at the communities of the Atlantic region, their impact has been limited mainly because of language barriers and the low population density. However, these factors are not a valid excuse for failing to meet the needs of these populations, since this situation leads to violations of human rights by the authorities.

VII. Conclusions

68. The legal and political framework that underpins the relationship between indigenous peoples and the Mesoamerican States varies, since the constitutions of some States still do not recognize indigenous peoples, while others recognize the right to self-determination, including recognition of indigenous autonomous or self-government regimes. Similarly, everything indicates that governments are continuing to expand social coverage and have prioritized children in poverty reduction strategies. Nevertheless, there is no systematic data disaggregated by ethnicity, gender and age group that gives an account of the situation of indigenous children in the subregion.

69. However, most of the inhabitants of these countries are young people. In Guatemala,[2] for example, 52 per cent of the population is under 20 years of age, which is particularly evident in the Altiplano and Alta Verapaz departments, which have the largest indigenous populations. In Nicaragua, 37 per cent are under 14 years of age and 53 per cent of the population is under 18.

70. The lack of ethnically disaggregated information means that there is no quantitative data to confirm the gaps between indigenous children and the rest of the population that perpetuate the cumulative cycle of disadvantages and historic exclusion of their families and peoples.

71. The differences start from birth. In Mexico, the risk of dying during pregnancy or childbirth is three times higher in predominantly indigenous municipalities. When one looks at the number of estimated births, the risk of dying is twice as high for women living in predominantly indigenous areas (with an indigenous population of between 40 and 69 per cent) and four times higher for those in entirely indigenous areas (with an indigenous population greater than 70 per cent).

72. The data from the third census on the height and weight of Guatemalan children, disaggregated by mother tongue, indicate that 34.6 per cent of children whose mother tongue is Spanish suffer from stunting or chronic malnutrition, while the prevalence among children whose mother tongue is not Spanish is almost double at 62.5 per cent. Chortí, Akateco and Ixil children have the highest rates of stunting: 80.7 per cent, 79.1 per cent and 76.9 per cent respectively.

73. With regard to years of education, it has been shown that there is less access to higher levels of schooling in rural areas and, consequently, the percentage of indigenous students, particularly women students, declines. In addition, the

[2] National Survey on Living Conditions, National Statistical Institute, Guatemala, 2011.

curricula and teaching methods are often culturally inappropriate, and indigenous children do not speak the language of instruction.

74. The Mexican national budget reflects the inequalities in public spending on indigenous peoples. The 10 per cent with the lowest HDI receive only 5.7 per cent of total public expenditure, and receive only 6.7 per cent of Government transfers to indigenous peoples, while the 10 per cent of the indigenous population with the highest HDI receives 31.7 per cent. In 2010,[3] it was shown that indigenous peoples received 9.34 per cent of total federal Government spending, which means that the non-indigenous population was the recipient of 90.7 per cent of such expenditure. No information is available to allow this level of budgetary analysis for the other countries.

75. The economic model prevailing in the subregion creates additional problems that affect children. For example, in Guatemala there are 291,467 children between 10 and 15 years of age, mostly indigenous, who participate in the labour market. Two-thirds of them are engaged in agricultural work, and 26 per cent of them are girls, with an average salary that is barely 22 per cent of the minimum wage, and is even lower in trade and industry.

76. However, the most worrying statistics from the study are those that offer a new profile of indigenous children resulting from political, economic and sociodemographic factors and the prevailing insecurity in the subregion.

77. From a demographic perspective, some alarming factors and trends have been noted:

(a) Indigenous children are descendants of families that were forced in recent decades to migrate to urban centres during military conflicts or after expulsion from their ancestral lands because of mining, forestry, and fishing concessions. They have usually settled in poor urban areas;

(b) They are part of the temporary migration flows in the region, accompanying family members, and they usually work without receiving direct payment; or

(c) They migrate towards the United States of America or Costa Rica seeking to contribute to the household economy. In these cases, they face a series of dangers ranging from violence to loss of life on their journey to the United States, and they have no support or protection of their rights on their journey or in the destination country.

78. These children face situations of family disintegration. When they stay behind with their mother, grandparents or aunts and uncles, they are vulnerable to further discrimination and abuse of all kinds, and are at risk of violence. Languages, customs and clothing have changed completely, especially since television and cable have invaded their homes. When they migrate they risk losing their national and ethnic identity.

79. Mesoamerica is the most violent region in Latin America. While there have been reports of children being viciously murdered, it has also been shown that organized criminal groups and gangs are involving and using children and adolescents in various criminal activities, including contract killings. It has also

[3] Human Development Report on Indigenous Peoples in Mexico, UNDP, 2010.

emerged that drug traffickers use children and adolescents to sell drugs, often paying them in drugs instead of money, so that they become addicts at an early age and are kept tied to trafficking networks.

80. There has also been an increase in cases of trafficking of indigenous girls and adolescents, with traffickers taking advantage of the disintegration of society and the loss of family, community and traditional indigenous values. This problem has become acute in border areas.

81. Another factor that is affecting rural areas, both in southern Mexico and in Guatemala, is that the land has become less productive and the prices for maize, beans and other agricultural products do not cover the required investment and labour costs. As a result, poppy and marijuana crops have proliferated and, in some communities, drug processing laboratories have begun to appear. This, together with the trafficking, has meant that many indigenous and rural families, faced with poverty and limited productivity and job opportunities, see no other options and are drawn into these illegal activities.

82. Although no records are kept, there are reports of children and adolescents who have no opportunity for education or employment and are recruited by gangs, drug traffickers and organized criminal groups who offer them "a family" and relatively large amounts of money but with no concern for the risks involved.

Recommendations

83. Governments should generate statistics disaggregated by ethnicity and provide data sources that allow a more accurate assessment of whether indigenous children are actually benefiting from the expenditure earmarked for them.

84. Governments and United Nations system agencies, academic centres and other actors should incorporate the variables of ethnicity, age and gender in their official studies, in order to produce a tool with a comprehensive and accurate overview of human development indicators.

85. Poverty and inequality are structural problems, which means that the positive impacts of social policies might not be sufficient to reduce the disparities in access to more and better human development opportunities for indigenous children.

86. The economic model of extractivism and social exclusion, in addition to historical factors of colonization and discrimination, is creating new gaps between indigenous children and the rest of the population. The historical gaps have been aggravated by these new problems that require special attention.

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Future work of the Permanent Forum, including emerging issues

Examination of the situation of indigenous peoples and their participation in democracies and electoral processes in Latin America under the United Nations Declaration on the Rights of Indigenous Peoples

Note by the Secretariat

In accordance with the decision taken by the Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 114), the Forum decided to appoint Álvaro Pop to prepare a report on the participation of indigenous peoples in democracies and electoral processes in Latin America.

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Examination of the situation of indigenous peoples and their participation in democracies and electoral processes in Latin America under the United Nations Declaration on the Rights of Indigenous Peoples

I. Context

1. The indigenous peoples of Latin America have always been excluded from the democratic process. The liberal rights of citizens established in the constitutions of Latin American countries were not, and/or are not being, fulfilled as far as their indigenous populations are concerned. To a large extent, State actors in the past took steps to thwart the universalization of the citizens' rights set forth in the social covenants on which the republics of Latin America were founded.

2. With the end of the period of dictatorships and the transition to democratic States at the end of the 1980s, the indigenous peoples of Latin America increased their political activities, and the debate about how to transform elitist democracies into participative and inclusive ones began. These fledgling political forces emerged with the capacity to transform traditional power structures. Two factors in the region were decisive in facilitating the insertion of the indigenous peoples into politics: (a) the 500th anniversary of the colonization of the Americas; and (b) the establishment of electoral processes.

3. The indigenous peoples' insertion into politics featured the following common denominators: (a) the increasing openness of political regimes; (b) the favourable international climate; (c) the relational character of politics at the time, i.e. the instability of the elites in the face of collective action; and (d) the simultaneous weakening and instability of the elites, which facilitated the emergence of a new model for the participation of indigenous peoples. On the political front, the indigenous peoples found transnational allies who pushed for the establishment of standards, principles and procedures for indigenous peoples' rights. Their work was crucial for the establishment of the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169) and, subsequently, the United Nations Declaration on the Rights of Indigenous Peoples. At the same time, significant advances were made at the international level, most notably with the establishment of the Permanent Forum on Indigenous Issues and the figure of the Special Rapporteur on the rights of indigenous peoples, both at the United Nations.

4. Seizing the opportunities posed by the transition from military to democratic governments and those afforded by democracy itself, diverse indigenous peoples' organizations were founded. As they gained strength, their proposals, their demands and their claims intensified, and, as a direct result of their organizational capacity, the first reforms were introduced in a number of Latin American countries.

5. The ways in which indigenous organizations took advantage of the opening up of the political arena have varied from country to country, as has the impact of their actions. In the 1980s a "new type of constitutionalism"[1] emerged, and since then

[1] Salvador Martí i Puig, "Después de la década de los pueblos indígenas ¿qué? El impacto de los movimientos indígenas en las arenas políticas de América Latina." Article published in the journal *Nueva Sociedad*, No. 227 (May-June 2010).

calls have been made for constitutional reforms to establish general legal frameworks in which multi-ethnic, multicultural and multilingual societies are recognized. Hence the implementation in Mexico (in 2001 and 2011) and Ecuador (in 1998 and 2008) of multicultural constitutions that acknowledge the countries' diversity. The 1985 Constitution of Guatemala also recognizes the existence of diverse ethnic groups, but passing a constitutional reform that is in line with the rights of indigenous peoples continues to be a challenge.

6. In the 1990s, civil society, including indigenous peoples, launched a joint campaign against poverty and political and economic exclusion. Driven by poverty and the lack of attention on the part of the State to their needs, some communities started abandoning their territories to seek work elsewhere and settled on the outskirts of towns and cities. At the same time, demands for justice and for the respect of human rights increased. Indigenous organizations started to play major roles in politics, and indigenous involvement in political parties and in civic electoral committees became more visible.[2]

7. In Mexico, in 2001, the organization Ejército Zapatista de Liberación Nacional went beyond defending its local cause, namely the interests of the indigenous population of Chiapas State, to present itself as a national operator when it submitted a bill on indigenous rights and culture to Congress. The Government of President Vicente Fox acknowledged that dialogue and recognition of the rights of the impoverished indigenous population was the only way out of the political crisis that insurgent groups had generated. This set the course for indigenous peoples' participation in Mexican politics and led to the appointment of indigenous people to certain government posts. It also sparked considerable debate about the nation State, the rights of indigenous peoples and the validity of the democratic systems in place in many parts of the world. At the same time, light was shed on the exploitation, marginalization and abandonment that rural communities, especially indigenous ones, experience at a time when State action is weak in the face of the process set in motion by the free trade agreement between the United States of America, Canada and Mexico.

8. In Guatemala, Rigoberta Menchú, in recognition of her career defending the rights of indigenous peoples, was awarded the Nobel Peace Prize in 1992. In 1996, the Peace Accords were signed, marking the end of over three decades of internal armed conflict, notable among them the Agreement on Identity and Rights of Indigenous Peoples. The Peace Accords paved the way for constitutional reforms to be proposed in 1999; however, these were not adopted. In 2012, the current Government of President Otto Pérez also proposed constitutional reforms, but without achieving any positive results. In fact, the justice system suffered a setback when the case of the genocide of indigenous peoples, particularly the Ixil Mayans, was closed. The genocide had been acknowledged by the Commission for Historical Clarification, but the case was arbitrarily dismissed by the Constitutional Court in 2013. Over 60 per cent of indigenous Central Americans live in Guatemala, and it is in that country that a new mode of political participation is emerging, inspired by the practice of adopting community-level positions on mining and hydroelectric projects in indigenous territories. Over 60 legally valid popular consultations have

[2] Temporary political-electoral organizations that put forward candidates to stand for election to municipal bodies. In Guatemala, these have played a major role in increasing the indigenous population's participation.

been held, and the Constitutional Court has ruled that their results must be heeded; however, the Court's position on whether decisions on investments in indigenous territories can be reversed is unclear. Although founded only recently, the Winaq political movement is an example of political electoral participation that is giving rise to debate and concern in some social sectors and hope and expectancy in others.

9. In Ecuador the formation and activism of Confederación de Nacionalidades Indígenas del Ecuador (CONAIE) played a major role in the political defeats of Presidents Abdala Bucaram, Jamil Mahuad and Lucio Gutiérrez. In 1998 a new Constitution was passed that recognized cultural diversity and indigenous peoples' rights. And, for the first time, there was an indigenous candidate for the presidency of the country, Antonio Vargas Huatatoca of the party Movimiento de Unidad Plurinacional Pachakutik-Nuevo País. Although the participation of indigenous peoples in politics has increased, indigenous organizations and leaders are expressing concern that the indigenous movement is being manipulated and that its leaders are being co-opted by national commentators.

10. Beyond the three countries already mentioned, important events that showcase the capacity of indigenous people as political actors have occurred elsewhere in the region as well. For example, the election of the Aymara leader Evo Morales, of the party Movimiento al Socialismo, as the President of the Plurinational State of Bolivia in 2005 and his re-election in 2009 significantly altered the political scene. This extraordinary election result caused the traditional parties' strategic pacts to crumble[3] and brought about a landmark shift in the legal, historic, institutional, economic and cultural parameters of democracy in the country.[4]

11. Bolivian democracy ceased to be a concern of the elite and became a concern of peoples; it was reborn with a collective identity that legitimized participation in politics. That collective identity ended up deposing the individual one, the liberal concept of citizenship, whereby citizens were called upon to act only every four years; in other words, it deposed electoral democracy.[5]

12. The leading role played by indigenous peoples in the three aforementioned countries and the inclusion of their collective rights in discussions and debate in Latin America spelled the end of the invisibility of indigenous peoples, the enhancement of their status and the recognition of diverse societies. Nonetheless, the formal recognition of the rights of indigenous peoples, the impact on the welfare of individuals and the eradication of poverty, inequality and exclusion are still matters that need to be resolved in the region.

13. Electoral democracy in Latin America has largely limited indigenous peoples' involvement to the local, municipal and rural arenas and to the exercise of citizenship at a secondary level. In this way it has curbed their capacity for action, as well as their influence, at the national level, on the construction of the nation State.

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[3] Juan Carlos Quinteros Ramos, "Reflexión sobre la democracia boliviana". www.monografias.com/trabajos57/democracia-boliviana/democracia-boliviana.html.

[4] Idón Chivi Vargas, "Democracia en Bolivia: entre memoria política e historia constitucional", *La Gaceta Jurídica*, 9 October 2012. Available from www.la-razon.com/suplementos/la_gaceta_juridica/Democracia-Bolivia-politica-historia-constitucional_0_1702029876.html.

[5] Ramón Rocha Monroy, "Democracia a la boliviana", *Los Tiempos*, 9 February 2013. Available from www.lostiempos.com/diario/opiniones/columnistas/20130209/democracia-a-la-boliviana_201706_430771.html.

14. Indigenous peoples continue to claim their individual and collective rights under left- and right-wing regimes alike. In both cases they have problems achieving full recognition, since exclusion is apparently part of the ideological base. Although the Latin American left has made progress in recognizing multicultural actors, Governments at both ends of the political spectrum have yet to meet the challenge of building nations that protect the rights of indigenous peoples, especially as far as their rights to free, prior and informed consent, the end of paternalism and the full exercise of citizens' rights are concerned.

15. Latin American democracies are currently facing serious problems, including the poor quality and dwindling legitimacy of political parties and the public's loss of confidence in them, as well as corruption, the assumption of contradictory positions by the different branches of Government, electoral clientelism, rising inequality despite economic growth and the separation between citizens' rights and the simple exercise of voting, all of which demand major reforms of the political systems in place.

16. Despite the limitations they face, in terms of information and economic capacity, in a profoundly clientelist and burdensome system, where affairs are conducted only in Spanish regardless of the multilingual environment; despite the system being urban in scope when the population is rural; and despite the system's failure to take account of their geographical, climatic and cultural realities, societies, especially indigenous peoples, are becoming increasingly involved in electoral processes.

II. Ecuador

17. Ecuador[6] is a plurinational, heterogeneous, multicultural State, with 14 indigenous nationalities and 18 indigenous peoples living in its Sierra, Amazonian and coastal regions. According to the 2010 census, the total population numbers 14,483,399 people, 7 per cent of whom are indigenous persons, living predominantly in rural areas. Indigenous organizations and international agencies offer different estimates of the indigenous population, varying between 24 and 40 per cent.

18. According to the 2001 census, the incidence of poverty measured by unmet basic needs was 89.9 per cent among the indigenous population, compared to 45 per cent among the white and mestizo populations. In 2009, that indicator fell to 70.3 per cent for the indigenous population, but remained over 30 points higher than for other population groups (31.3 per cent for whites; 37.9 per cent for mestizos). There was also an increase in income poverty among indigenous people (from 36.8 per cent of the indigenous population in 2006 to 45.8 per cent in 2009).[7] The disproportionately high rates of poverty among indigenous peoples with respect to the national average reflect the historical ethnicity-based discrimination they face. In the international context, according to the United Nations Development Programme (UNDP) Human Development Report 2013, *The Rise of the South: Human Progress in a Diverse World*, Ecuador ranked 89th out of 186 countries, with

[6] Summary based on an internal document prepared by Ferrán Cabrero as input for this document.

[7] Juan Ponce and Alberto Acosta, "La pobreza en la 'revolución ciudadana' o ¿pobreza de revolución?", Centro Andino de Acción Popular (No. 81, December 2010), p. 7-19.

a human development index of 0.724 in 2012 — slightly below the 0.741 average for Latin America. Even so, Ecuador is a high income country, yet another reflection of its economic inequalities.

19. The "citizens' revolution" promoted by the current President, Rafael Correa, and the Alianza País movement has marked a turning point in Ecuadorian politics, with greater weight being given to the State and public expenditure. The most significant political change has been the adoption of the 2008 rights-based Constitution and the corresponding constitutional mechanisms for securing those rights. The Constitution is based on dialogue among the various social and political actors and, in an acknowledgement long demanded by the indigenous movement, it declares the country to be a plurinational and intercultural State (article 1).[8]

20. With the current Government, substantial progress has been made in the exercise of political rights, especially with regard to the entry of indigenous professionals into the diplomatic corps and other branches of the civil service. However, the Government's overall political project is moving forward in a climate of ambivalence and contradictions. On the one hand, there are examples of undeniable progress, such as the improvement and expansion of public infrastructure, particularly the road network, as well as hydropower plants (eight new plants have been built, including the landmark Coca Codo Sinclair), and the new airport in Quito. There has also been an increase in the budget for health and education, and the efficiency of State services has improved. On the other hand, some community and indigenous leaders and organizations view as a step backwards the fact that indigenous leaders have been co-opted or "burned" (*quema*)[9] as a result of their active involvement in a traditional political party and/or their acceptance and fulfilment of duties within State institutions. Examples include the creation of the Secretariat of Peoples, Social Movements and Citizen Participation, and the Ecuadorian Institute for Eco-development of the Amazon Region, which are seen as attempts to infiltrate and further divide the indigenous movement; the progressive dismantling or elimination of indigenous institutions such as the National Directorate for Bilingual Intercultural Education, the Intercultural Health Department and the Council for the Development of the Nationalities and Peoples of Ecuador; the inexcusable deferral of the right to prior consultation contained in the new Constitution; and the treatment of social protest as a judicial matter, involving repression and prosecution, according to statements by national indigenous leaders.

21. Contradictions with the development world view of indigenous peoples are evident in the adoption of a law on large-scale open cast mining; the "XI Oil Round" that launched the auction of 13 oil blocks in the Ecuadorian Amazon region (Pastaza and Morona-Santiago provinces) in November 2012; and the increasing tensions surrounding the right of indigenous peoples to prior consultation, not only with regard to the actions and mega-projects that directly affect their rights, but also in relation to proposed legislation such as the draft culture act, the draft water resources act, and the draft land act.

[8] "Ecuador is a constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, plurinational and secular. It is organized as a republic and is governed using a decentralized approach". Article 1, Constitution of the Republic of Ecuador, Title I: Constituent Elements of the State, chap. 1.

[9] "*Quema*" is a colloquial term used to express political wear and tear and the loss of credibility experienced by some leaders when they occupy government posts.

Reflections on indigenous participation

2013 electoral process

22. Indigenous voter participation in the 2013 electoral process was affected by the concentration of indigenous people in rural and remote areas, illiteracy (especially among women), problems with voter lists owing to international migration by indigenous persons and difficulties in updating the lists, and the lack of identity cards (personal identification documents).

23. The indigenous movement accuses the major parties of fragmenting its foundations through various strategies involving clientelism or the co-option of leaders while they are in government, including by distributing picks and shovels; appointing local indigenous officials to public posts; establishing forestry and agriculture partnership programmes, delivering urea and lambs, and expanding the Human Development Bond cash transfer programme. It should be stressed that few indigenous people have been included on the lists of National Assembly members of the parties most recently in power. The lack of data disaggregated by ethnicity has made it difficult to determine indigenous participation in the electoral process, not only as voters but also as candidates for election.

24. One of the conclusions of the 2013 electoral process was that indigenous people did not vote for the indigenous political movement; only 20 per cent of the cantons where indigenous people make up the majority of the population voted for Pachakutik. Why did the indigenous peoples of Ecuador not vote for the indigenous party? There are a number of assumptions, including: (a) structural factors relating to the indigenous movement, such as its inability to organize and unite large segments of society dissatisfied with traditional politics; its inability to regain influence with local constituencies co-opted by other political parties, particularly in the Sierra and Amazonian regions; and the weakening of CONAIE owing to its loss of relevance for grass-roots indigenous communities, and the limited capacity of its new leaders in public office; and (b) contextual factors such as the inability to avoid divisions among local candidates; the dubious benefit of an alliance with Movimiento Popular Democrático (associated with the "partitocracy" of the past and with clientelism); inadequate and belated policy communication strategies; and the impact of government policies, such as the Human Development Bond, on communities. In addition to these factors, the evident division and weakening of Pachakutik also caused dispersion and fragmentation of the indigenous vote.

Historical political participation

25. Indigenous organizations have been the foundation of the indigenous social movement. In the 1980s, indigenous organizations grew in strength and consolidated their demands in order to begin formulating indigenous proposals and an indigenous political vision. Ecuadorian indigenous peoples sought to streamline their efforts by establishing organizational groups, which then came together as CONAIE. Established in the 1980s as the leading umbrella organization for indigenous peoples, it is the only grouping that incorporates the demands of indigenous peoples and nationalities within its political vision.

26. The potential of indigenous peoples in politics gained greater national and international visibility as a result of Movimiento Pachakutik's six months in government in alliance with the party Sociedad Patriótica, following the presidential

elections that brought Colonel Lucio Gutiérrez to power. For example, for the first time ever, Ecuador had a Kichwa woman as Minister for Foreign Affairs, which was of historic significance both in Latin America and worldwide. The main reason for the breakdown of that alliance was the elected President's betrayal of campaign objectives, an experience that divided the indigenous movement.

27. The political participation of indigenous people in the capacity of provincial prefects, councillors, mayors and deputies demonstrates the level of democratization of the parties and the involvement of indigenous peoples in political decision-making forums. However, participation has been low and predominantly through Movimiento Pachakutik-Nuevo Pais.

28. In the 2013 legislative elections, only 5 of the 137 Assembly members were elected by the political movement Pachakutik-Nuevo País, three of whom self-identified as indigenous. In the 2009 elections, four Pachakutik representatives were elected; owing to the lack of data disaggregated by ethnicity, it would be a mistake to conclude that these four Assembly members were indigenous. Previous results show that the number of Pachakutik representatives fell from 3.22 per cent of the total in 2009 to 2.29 per cent in the 2013-2016 legislature.

29. The political participation of indigenous peoples in the State involved a process of internalization and recognition as subjects of law. That participation is part of a process that led indigenous peoples to demand and exercise their political rights, both as individuals and collectively.

30. Traditional political parties have included the issue of "indigenous peoples" and their demands in political and electoral discourse. However, in practice, their governmental plans do not contain any serious consideration of how to respond to the historical demands of indigenous peoples. Indigenous activists have also been excluded from decision-making; in particular they are placed last on the lists of candidates for elective office.

31. Pachakutik has been an open and inclusive forum that set an important precedent for the democratization of power and the participation of indigenous peoples in party politics, thereby redefining the Ecuadorian political arena.

III. Guatemala

32. Guatemala is a multi-ethnic, multilingual and multicultural country, in which three indigenous peoples (the Maya, Xinca and Garifuna) live alongside the non-indigenous population (creoles, whites and mestizos). The official language is Spanish; however, the National Languages Act (2003) recognizes, respects and requires the use of the languages of each linguistic community. The Act recognizes the existence of 25 languages, namely 22 Mayan languages, Xinca, Garifuna and Spanish, and defines the framework for public policies.[10]

33. According to the 2002 census (11,183,388 inhabitants), 41.3 per cent of the population is indigenous. The lack of statistical information disaggregated by

[10] Inputs drawn from: Misión Indígena de Observación Electoral, "Registro de 12 años de historia política electoral de Guatemala", *Ciudadanía intercultural: aportes desde la participación política de los pueblos indígenas en Latinoamérica* (Intercultural citizenship: contributions from the political participation of indigenous peoples in Latin America) (UNDP, 2013).

ethnicity has been a constraint; indigenous organizations claim that indigenous peoples account for a higher percentage of the total population than is indicated by the official figure. The indigenous population is concentrated in departments in western Guatemala (Totonicapán (97 per cent), Sololá (96 per cent), El Quiché (89 per cent) and Chimaltenango (78 per cent)) and the north of the country (Alta Verapaz (90 per cent) and Baja Verapaz (90 per cent)).

34. In Guatemala there are clear inequality gaps. The country has the highest per capita concentration of jets, helicopters and luxury cars. The highest quintile of the population has almost two thirds of national income, and the lowest quintile has only 3 per cent. The lack of economic competition and the enjoyment of privileges in return for political favours, as well as the speed at which money can be accumulated through illicit and criminal activities including drug trafficking, smuggling, money laundering, trafficking in persons and corruption, are rapidly increasing the inequality gap, with the result that clientelism is now the easiest route to upward mobility.

35. The Guatemalan Constitution of 1985 and the 1996 Peace Accords recognize Guatemala as a multi-ethnic, multicultural and multilingual nation. The historic importance of the Agreement on Identity and Rights of Indigenous Peoples is that it marked a watershed moment in the struggle of indigenous peoples to be recognized as full citizens, identified the pressing need for State reform with an intercultural approach, and required the construction of a nation with multicultural capacity. The Government pledged to promote legal and institutional reforms to facilitate, regulate and guarantee such participation; however, despite the efforts made in 1999 and the proposals revived in 2012 by President Pérez Molina, reform of the Constitution has yet to be achieved.

36. Although progress has been made in terms of the extent to which multiculturalism is recognized, respected and promoted in the Constitution and in the country's ordinary laws and regulatory acts, as well as its applicability through Government agencies, the Constitution and the Electoral and Political Parties Act do not yet incorporate the commitments of the Peace Accords; nor are they consistent with various international instruments, specifically ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples, which promote the active participation of indigenous peoples. They do not address multicultural and intercultural citizenship, which is a fundamental requirement in Guatemala owing to the multicultural, multi-ethnic and multilingual nature of its population.

Political participation of indigenous peoples

37. Election turnout has been increasing in Guatemala, with significant indigenous participation. Similarly, the number of candidates for elected positions has increased considerably and political parties have understood the electoral potential of putting forward Mayan candidates; not to mention the political space won by the indigenous peoples themselves. A positive factor that encouraged indigenous electoral turnout was the decentralization of voting with the establishment of new electoral constituencies in rural areas in 2007 and a further increase in their number in 2011.

38. Two indigenous men participated in the electoral process of 2007 as candidates for the presidency and vice-presidency.[11] The average national increase in the 2011

[11] Rigoberto Quemé was a candidate for President and Pablo Cuto for Vice-President.

electoral roll compared with 2007 was 23 per cent; however, the increase in departments with an indigenous majority was between 28 and 34 per cent. After the 1985 and 2007 elections, there was an increase in indigenous electoral turnout in 2011. While turnout averaged 69.38 per cent, in departments with an indigenous majority it was 74 per cent on average, and at the municipal level (where the indigenous population is above 80 per cent) it ranged from 80 to 92 per cent.

39. These increases in both the electoral roll and voter turnout can be interpreted in various ways; they could be seen to reflect the strengthening of citizenship and the exercise of the right to vote, or viewed as a result of clientelism during election campaigns. It should be recognized that the aim of the assistance programmes of the Government of President Álvaro Colom (2008-2012) was to mobilize the population, targeting identity cards, voter registration, voter mobilization and civic training as components of citizenship. However, it is important to analyse the indigenous and rural vote, since this determined the outcome of the 2007 presidential elections. Previous elections had been decided by urban voters and, in 2011, it was again the urban vote that decided the outcome of the presidential election.

40. In the 2011 presidential elections, two of the ten sets of candidates included indigenous women, as candidates for President and Vice-President respectively.[12] The participation of the Winaq party, the leading indigenous political party in the country, was particularly significant, because it demonstrated the existence of disenfranchising and racist stereotypes in certain sectors of Guatemalan society. The historic candidacy of the first indigenous woman, Rigoberta Menchú, to run for President in a Latin American country was also worthy of particular note.

41. Indigenous political participation in the legislature between 1999 and 2011 ranged from 10 to 13 per cent. The representation of indigenous women in the same period fluctuated between 0.6 and 2.5 per cent. At the municipal level, on average 35 per cent of municipalities were won by indigenous candidates between 2003 and 2011. The current President appointed only one indigenous minister and two indigenous governors (out of 22). This reflects the underrepresentation of the 41.3 per cent of the Guatemalan population that is indigenous.

42. The main factors limiting political participation by indigenous peoples have been monolingualism, illiteracy, a lack of knowledge about the electoral system, a lack of information on where and how to cast a vote, poor polling station infrastructure, a lack of democratization in temporary electoral bodies, political clientelism, busing-in of voters and discrimination against women and the elderly. These are in addition to other problems such as identity fraud, the distribution of political propaganda on the day of the election, the failure to use local languages to convey election results and the funding system for political parties.

Reflections on political participation

43. Although considerable progress has been made in the Supreme Electoral Tribunal in terms of logistics and technical mechanisms, racism and discrimination against indigenous peoples persist. Despite efforts to establish and increase the number of municipal electoral constituencies in order to make polling stations more

[12] The presidential candidacy of Nobel Peace Prize winner Rigoberta Menchú of the Winaq party and the vice-presidential candidacy of Laura Reyes, nominated by Partido Renovación Democrática.

accessible in rural areas, the infrastructure and voter processing conditions entail serious disadvantages compared to urban centres.

44. Discriminatory practices towards indigenous peoples remain widespread and structural, reducing these people to the status of second-class citizens, as documented in the four national reports of the Misión Indígena de Observación Electoral (electoral observation body in Guatemala); such discrimination is evidenced by the limitations faced, in terms of information and economic capacity, in a profoundly clientelist and burdensome political party system, where affairs are conducted only in Spanish regardless of the multilingual environment; which is urban in scope when the population is rural; and which fails to take account of geographical, climatic and cultural realities. This scourge of Guatemalan society can also be seen in the infrequency with which indigenous persons, especially indigenous women, are elected to public office. In four electoral cycles, the largest proportion of indigenous representatives in the Congress has been 13 per cent, and the figure for indigenous women is 2.5 per cent. Youth have been mobilized to provide logistical support but have no scope for real participation.

45. One of the achievements of the indigenous movement has been the inclusion of indigenous issues in public policy debates. Participation in general, local and district elections has increased. However, there is a need to analyse the quality of the indigenous vote to determine whether it is an informed vote or a vote influenced by clientelism during election campaigns. When indigenous candidates do run, it tends to be for low-level positions that they have little chance of winning. The challenge is to improve the conditions for participating in and the chances of winning elections, and ensure greater access to government.

46. The presence of the Winaq political movement is a sign of progress in the dynamics of Guatemalan party politics and shows that indigenous peoples are capable of setting up a political party and winning seats. Winaq was founded by Rigoberta Menchú. With a diverse membership and inspired by the philosophy of "people's power", it intends to transform the political system into a democracy that reflects the realities of its population. The first time it took part in an election, in coalition with a leftist party in 1997, it won 2.77 per cent of the vote in the presidential election and one seat in Congress. In 2011, the first time it participated as a political party, joining with other left-wing parties to form the Frente Amplio movement, it obtained 3.2 per cent of the vote in the presidential election and won one seat in Congress.

47. Winaq has been held back by its participation in a political party system characterized by million-dollar election campaigns, political clientelism and privately funded parties that have preferential access to communication media.

IV. Mexico

48. Mexico[13] is a multicultural country of 68 indigenous peoples, speaking 364 linguistic varieties.[14] According to the population and housing census carried out in 2010 by the National Institute of Statistics and Geography, 6.9 million people

[13] Summary taken from consultation on electoral observation in regions with an indigenous population (Victor Leonel Juan Martinez).

[14] National Commission for the Development of Indigenous Peoples.

speak one of the country's 68 indigenous languages and 11.1 million live in an indigenous household, amounting to 9.9 per cent of the population. The results of the expanded questionnaire, conducted alongside the basic questionnaire for the 2010 census, show that 15.7 million people self-identify as indigenous people.[15] The country's indigenous population is concentrated in six states in the south and south-east. Oaxaca is the state with the largest number of indigenous people, followed by the States of Chiapas, Veracruz and Puebla, with more than 1 million, and the States of México and Yucatán, with more than 985,000.

49. In 624 of the country's 2,456 municipalities, more than 40 per cent of the inhabitants are indigenous people, accounting for 58.3 per cent of the country's indigenous citizens, although most indigenous people live in the rural parts of those municipalities.

50. Regarding development, all of the indicators in the census show that the living standards of indigenous people remain below the national average. In 2010, the extreme poverty rate among indigenous people was 39 per cent, whereas the national average was 10.5 per cent; and the illiteracy rate among indigenous people was 21.5 per cent, whereas the national average was 6.9 per cent. Development indicators for indigenous peoples in general differ significantly from those of the rest of the population. The UNDP 2013 Human Development Report, entitled *The Rise of the South: Human Progress in a Diverse World*, ranked Mexico 61st out of 186 countries, with a human development index of 0.775, which is high and significantly better than the Latin American average of 0.741. However, that clearly reveals the inequalities in the application of public policy and the historical exclusion of indigenous peoples.

51. The Government of Mexico acknowledges the cultural diversity and rights of indigenous peoples in the country's Constitution and in related international instruments.

52. As a result of the constitutional amendments of 2011, judges must give pre-eminence to the human rights enshrined in the Mexican Constitution and the international treaties to which the Mexican State is party, above any other contrary regulation. Rulings issued by the Mexican Supreme Court of Justice constitute binding precedents.

Political participation of indigenous peoples

53. Article 2 of the Constitution states that indigenous peoples have the autonomy to elect, in accordance with their traditional rules, procedures and practices, their own authorities and representatives for the exercise of their own systems of governance. It therefore guarantees indigenous communities the right to elect their authorities in accordance with their own regulatory systems. With that protection, elections in indigenous communities and municipalities can be governed by their

[15] Indigenous population means all persons living in an "indigenous household", where the head of the household, his or her spouse and/or one of his or her ascendants (mother or father, stepmother or stepfather, grandmother or grandfather, great-grandmother or great-grandfather, great-great-grandfather or great-great-grandmother , mother-in-law or father-in-law), stated that he or she was a speaker of an indigenous language. It also includes persons who stated that they spoke an indigenous language who are not members of such households. This criterion was used for the 2010 population and housing census of the National Institute of Statistics and Geography.

internal regulatory systems, by the system of political parties or by mixed models. However, that is not yet a reality.

54. A study carried out by the network of electoral observers in Chiapas points to the manipulation of women political leaders, widespread bribery, women's perception of campaigns based on constructed images of candidates and election promises; the structural conditions of women's poverty, sexist language, abuse of the image of indigenous women in campaigns, differences in journalistic coverage of male and female candidates; and, of course, the failure to take account of gender-related issues in the construction of speeches and campaigns. The study poses the question of whether participation by indigenous women in elections constitutes the exercise of their political rights or an expression of coercion and vote-buying. Also, political parties use intimidation and anti-poverty programmes for electoral purposes, buy voter identification cards or exchange votes for short-term goods. In other words, they engage in political clientelism.

55. Current Mexican electoral dynamics are two-faceted: federal, state or municipal elections are conducted in accordance with the processes inherent in a liberal representative democracy, while respecting and being aligned with traditional indigenous political practices and models of participatory democracy: meanwhile, indigenous peoples exercise their right to self-determination and autonomy in choosing their own government at the community level. Indigenous peoples exercise their civic right under the two systems recognized in the Constitution: in the traditional system in the context of collective, multicultural and ethnic citizenship, and in the democratic system in the context of liberal citizenship through the ballot box. Such electoral practices demonstrate the coexistence of two distinct ways of envisioning and exercising citizenship; this two-faceted process is slowly but surely being implemented.

56. Indigenous peoples' political rights are exercised differently at the community, municipality, state and federal levels. The government and electoral systems in place at the community level are not enshrined in the federal Constitution. However, the community level is recognized by various federal states and it is an important aspect of their political organization. This is the case in the States of San Luis Potosí (which recognizes "communities"), Guerrero ("commissaries"), Yucatán ("the people"), Tabasco ("integrated centres"), Tlaxcala ("auxiliary presidencies") and Oaxaca ("the community").

57. Despite their significant presence in the country, there is little participation by indigenous people in the legislature and they have a sketchy presence on the radar of Mexican political parties. To date in Mexico there are no indigenous political parties or independent candidates, limiting the likelihood of indigenous representation at the federal or national levels.

58. Since the end of the 1990s, attempts have been made to encourage indigenous people to stand as candidates in elections to the lower and upper chambers of the Mexican Congress. Proposals have included the establishment of a sixth electoral constituency for indigenous candidates; obliging political parties to guarantee participation by indigenous people in electoral districts where they account for more than 40 per cent of the total population; and proportional representation seats in Congress for indigenous people or the obligation for political parties or coalitions to submit lists containing indigenous candidates to the Federal Electoral Institute.

59. In February 2005, the General Board of the Federal Electoral Institute approved the boundaries of the 300 electoral districts into which Mexico is divided and the indigenous population was included for the first time. As a result, there are now 28 indigenous electoral districts where indigenous people account for 40 per cent or more of the population.

60. In the regional or national political context, communities with legitimate and stable regulatory systems are able to keep their individual party preferences separate from those systems. In other words, such preferences come into play in elections external to the community (municipalities, state legislatures and governorships, and the legislature, senate or the federal presidency) and political parties are not seen as a threat to the stability of the community; party committees or structures even exist in some communities.

61. Votes in external elections may sometimes be collectively agreed in favour of one or another party; or they may be swayed by manipulation by community leaders or external political operators. They may also constitute a collective mechanism for analysing the best option, the one most likely to benefit the community with public works or resources.

62. On the other hand, in communities whose regulatory systems have been weakened by conflict or where there are long-standing ideological differences and positions, group or party political identities do play a fundamental role in elections, in political jockeying and in candidates' proposals. The presence of political parties cannot be written off as the underlying factor in community rifts, although that can sometimes be the case.

Reflections on the political participation of indigenous peoples

63. The indigenous movement has no doubt that the struggle for self-determination must inevitably be played out in the fight for political power at the municipal level; once power is in the hands of communities, programmes can be designed in accordance with their basic needs.

64. Although the legislation of various states enshrines the right to political autonomy, in practice it is unfeasible. The exception is the State of Oaxaca, where in seven elections, 418 municipalities have voted for their councils in accordance with their own internal regulatory systems, which represents an important step forward in terms of politics and the electoral system, and an essential one for any democratic state.

65. Indigenous leaders who aspire to take a seat in state congresses do so through a political party, whether at the national or state level. Membership of those parties depends on their openness and/or that of the indigenous leaders themselves. Mexico is currently debating whether to establish state indigenous parliaments or special electoral constituencies.

66. The political participation of indigenous people in the official electoral system is part of that debate and entails various challenges because the proposed establishment of independent candidacies ushers in a range of possibilities for political representation outside of traditional political parties. Movimiento Indígena Nacional proposes a constitutional amendment to create indigenous constituencies from which "plurinominal" legislators would be drawn; such legislators would not

be directly elected but would be assigned to seats on the basis of proportional representation.

V. General reflections

> It is not easy in a short space of time to change centuries of ethnocentric and racist views, of exclusionary political practice and theory that has resulted in an undemocratic democracy.
>
> Víctor Hugo Cárdenas
> Bolivian sociologist and politician with an indigenous heritage

67. The main measure of progress in the dominant Latin American economic model is gross domestic product, a parameter that has distorted the true meaning of progress and well-being. Harm to ecosystems, the loss of biological diversity and the erosion of cultural and linguistic diversity — all results of the failure of the economic model — are not shown on such a balance sheet.

68. In the UNDP Human Development Report 2013, the use of the phrase "the rise of the South" indicates that inequality has declined in underdeveloped countries and that the large economies have developed rapidly, thereby improving the living conditions of their populations. However, although inequalities are declining in the Latin American region and progress has been made at the regional level towards meeting the targets established under the Millennium Development Goals, the region's indigenous peoples have been left behind. The human development index for indigenous peoples in the countries studied is significantly lower than the national averages.

69. In recent decades, the indigenous peoples of Latin America have seriously called into question current development models and the type of democracy resulting from them. From being mere social participants, they have become active political participants who have increasingly called their societies to account, accusing them of being exclusionary, racist and unaware of history, and of refusing to see the diversity and acknowledge the existence of social participants with a different culture and world view from the homogenizing and integrationist State model. The challenge facing Latin American democracies is to listen to these arguments and take real steps to bring about change. However, the indigenous peoples, especially indigenous women and youth, must also make their voices heard and influence governments to ensure that their political rights are respected and can be exercised. This must be the focus of the debate about rebuilding States on new foundations, supported by the stand taken by indigenous peoples at the local level, as evident in the various forms of organization that exist.

70. Electoral processes, as the most visible aspect of democracies, are the last link in the chain of democratic institutions; however, some Latin American democracies have descended into mere electoralism, as demonstrated by the limitations, in terms of information and economic capacity, of a profoundly clientelist and burdensome system, in which affairs are conducted only in Spanish regardless of the multilingual environment; which is urban in scope when the population is rural; and which fails to take account of geographical, climatic and cultural realities.

71. Pachakutik is for Ecuador what Xel-ju is for the K'iche' population of Quetzaltenango, an expression of political dignity for Guatemala. In other words, beyond the actual electoral results, it demonstrates the capacity of indigenous leaders to participate and compete in burdensome, clientelist, monocultural electoral systems, bringing a new focus that is rejuvenating indigenous political life and renewing its values. The need to develop new electoral strategies and frameworks was, however, evident in the 2013 elections.

72. In other words, the goal of democracy in Latin America has not yet been fully reached; the democracy experienced by indigenous peoples, expressed in the context of elections, has fostered inequality and inequity and has been implemented by racist, exclusionary and high-handed Governments.

73. Nonetheless, in the countries analysed, there has been progress in electoral democracy, if this is understood as the democracy that citizens periodically exercise when they elect mayors, deputies, governors and presidents; in other words, when they choose a candidate from a list prepared by the real decision makers. In its ideal form, a democracy, through the exercise of the civic right to vote and to be elected through a ballot, presupposes that citizens, by voting, choose who will represent them and place their confidence in their representatives in the hope that they will take decisions for the common good in their exercise of power.

74. Indigenous peoples have participated in the political process ever since democratic systems were established in Latin America, although in some cases such participation has been individual, through involvement in various political parties. However, the participation of indigenous peoples in civic committees in Guatemala and in the diverse expressions of political organization characteristic of ancestral peoples in both Mexico and Guatemala, is of particular note. The Guatemalan civic committees are a social movement expressing different political values from those of the traditional political parties, especially at the local level. As for the various forms of community organization and ancestral authority, these have played a vital holistic role in fostering local well-being.

75. A concern to have indigenous political projects constructed for and by indigenous people, corresponding to the needs of those peoples and of groups traditionally excluded from public policy, has been born out of experiences of electoral participation in traditional political parties. In other words, such experiences have given rise to a need to create inclusive democracies that correspond to the characteristics of multi-ethnic, multilingual and multicultural societies. Experiences with the Pachakutik political movement in Ecuador (launched in 1995) and the Winaq political movement in Guatemala (launched in 2007) are significant in this regard. In particular, the local political participation of the Xel-jú civic committee (a K'iche' Mayan indigenous-based organization), established in 1972 in Quetzaltenango, Guatemala, should be highlighted. This civic committee is the country's oldest political organization; it has been a school for political training and won the mayoral elections in two consecutive periods.

76. Despite the advances and achievements of indigenous peoples with regard to inclusion and political participation, the creation of public institutions and the existence of international instruments — such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples — there are still challenges that indigenous peoples need to overcome in order to make political

participation the best vehicle for progressing towards the fulfilment of their demands and improving democracy. In particular, indigenous peoples need to:

(a) Influence the legal reforms needed for recognition of their rights and acknowledgement of the intercultural nature of States. In this regard, constitutional and/or electoral reforms are vital. Constitutional reforms are needed to ensure recognition of the right to self-determination and autonomy of peoples. The evaluation of compliance with the United Nations Declaration on the Rights of Indigenous Peoples in Guatemala clearly reflected the need for a national constituent assembly with full indigenous participation. With regard to electoral reform, it is vital to change the system of financing political parties and electoral campaigns, and open up genuine opportunities for participation by indigenous peoples, women and youth, both in political parties and local civic committees and in the various public institutions implementing electoral processes. This means building the necessary capacity to connect local realities with national and regional construction processes, taking into account the wider Latin American and global contexts, and, when required, recognizing community-based autonomy and ancestral authority in ongoing respectful dialogue with national political systems;

(b) Value and promote women's leadership development and capacity-building, bearing in mind that, at present, male leaders are given priority over female leaders;

(c) In relation to administrative and legislative decisions, establish mechanisms for binding political dialogue between indigenous peoples, private initiative, parliaments and Governments, in order to minimize the conflicts generated by the exploration and exploitation of current strategic resources — water, forests and subsoil assets — located in the territories of indigenous peoples;

(d) Recognize and respect different citizenships, in other words, recognize intercultural democracies that are conducive to the full participation of indigenous peoples in the creation and implementation of laws, in the recognition of indigenous peoples' own mechanisms, in the command structures of the institutions established and in public policy planning.